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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON AND ALFRED F. MACDONALD, PETITIONERS,

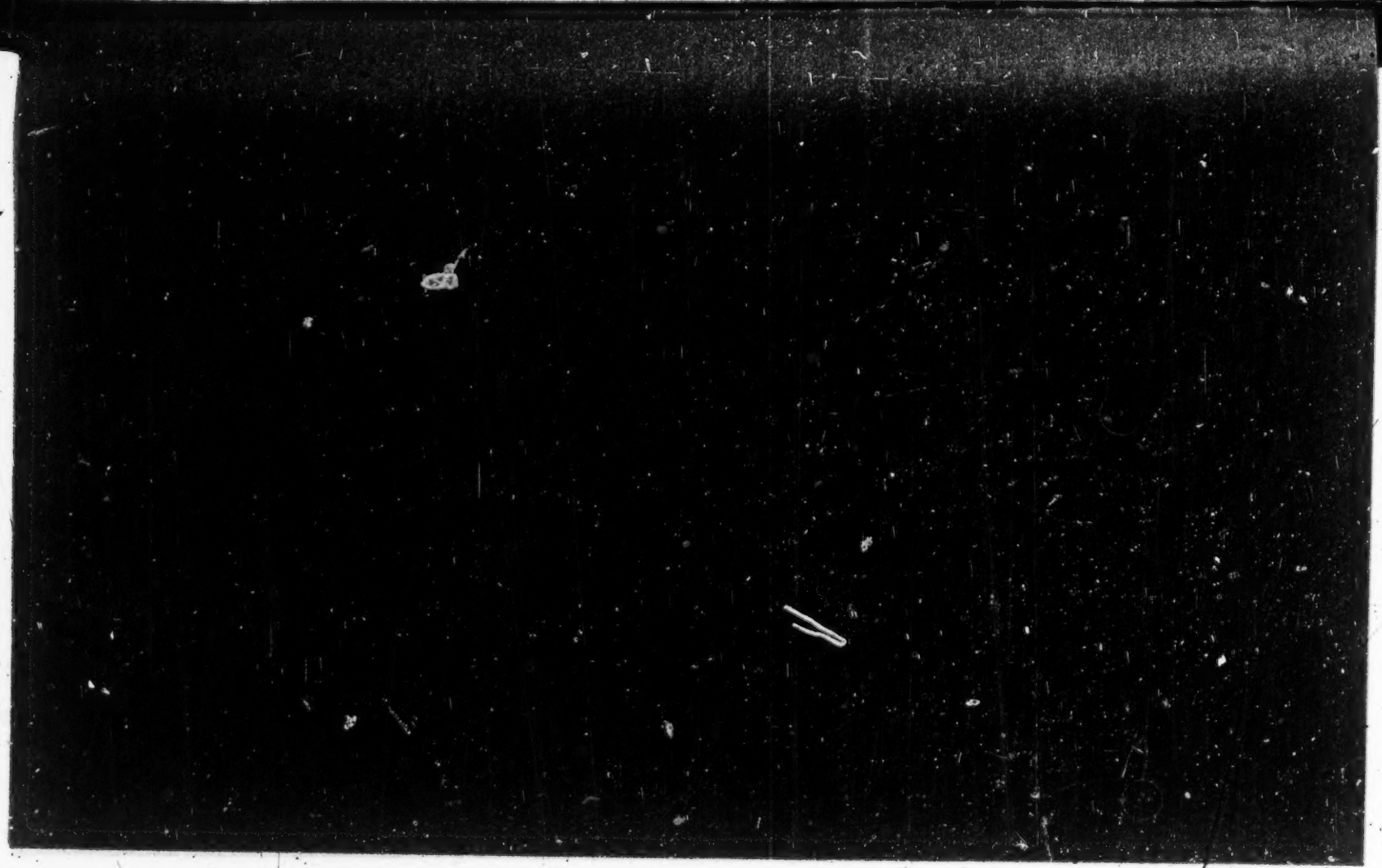
vs.

SAMUEL L. CARPENTER, JR., INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED APRIL 2, 1938.

CERTIORARI GRANTED MAY 16, 1938.



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INDEX.

	PAGE	FOLIO
Amended Complaint in Intervention and Response to Order to Show Cause (Robert J. Webb, et al.)	1288	3862
Amended Notice of Appeal of Wm. H. Neblett	1446	4336
Affidavit of Service by Mail	1452	4355
Answer and Objections of Interveners, Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans, to Petition for Approval of Revised Rehabilitation and Reinsurance Agreement, and to Order to Show Cause With Respect to Rehabilitation and Reinsurance	1160	3478
Affidavit of Mailing	1170	3509
Answer of Interveners to Petition and Order to Show Cause (Marshall D. Hall and Joseph C. McManus)	773	2318
Answer of Interveners to Petition for Approval of Second Proposed Rehabilitation and Reinsurance Agreement (Marshall D. Hall and Joseph C. McManus)	914	2740
Exhibit B. Plan of Reorganization Submitted on Behalf of Non-Cancellable Income Policy Holders	981	2941
Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California and Pacific Mutual Life Insurance Company to Complaint in Intervention of George I. Cochrane, W. H. Davis, Douglas E. C. Moore, and Stanley M. McClung	579	1736

PAGE FOLIO

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of Harold S. Cook..... 586—1757

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of Andrew J. Copp, Jr..... 558—1673

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of Neil S. McCarthy..... 563—1688

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of R. Rubinowitz..... 556—1667

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California and Pacific Mutual Life Insurance Company to Complaint in Intervention of Robert J. Webb, Philip M. Klutznick, and Hyman H. Alterman, for Themselves and All Other Persons Similarly Situated..... 571—1712

PAGE FOLIO

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of C. N. Wesley, L. S. Larson, E. H. Miller and George W. Struckman..... 568—1703

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Petition of Intervention by Carl C. Katleman, for Himself and All Others Similarly Situated..... 551—1652

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Petition in Intervention of Wilber G. Katz, Norman Crawford and Robert A. Crawford..... 565—1694

Answer of Harold S. Cook to Order to Show Cause and Return..... 290— 868

Answer of Respondents E. B. Tilton, Frank L. Stebbins, A. J. Russell, Richard E. Smith, Walter D. Fansler, Frank H. Higgins, and John T. O'Connell to Petition for Approval of Rehabilitation and Reinsurance Agreement and in Response to Order to Show Cause Made and Entered Herein September 25, 1936.....1102—3304

Exhibit A. Non-Cancellable Income Policy..1118—3352

	PAGE	FOLIO
Answer Re Application for Order Appointing Conservator	33—	97
Answer Re Application for Order Appointing Liquidator	48—	142
Answer to Complaint in Intervention of Wm. H. Neblett	548—	1643
Answer to Order to Show Cause of Defendants Rowe Sanderson, Henry B. Safford, Harold Bayly, Robert S. Breger and Laurens Max Chapman, Non-Cancellable Policyholders	458—	1373
Appearance and Answer of Respondents Hereinafter Named, to the Petition and Order to Show Cause Heretofore Issued by the Above Entitled Court	1196—	3586
Exhibit "A". Proposal to Reinsure the Business of The Pacific Mutual Life Insurance Company of California	1211—	3631
Appearance and Answer Re Application for Order Appointing Conservator	33—	97
Appearance and Answer Re Application for Order Appointing Liquidator	48—	142
Appearance and Objections to Petition for Approval of Rehabilitation and Reinsurance Agreement	1192—	3574
Appearance of Robert Casamajor, Walter A. Barnes, Paul V. Barnes, and Clarence August Siegfreid, and Return to the Order to Show Cause	631—	1892

PAGE FOLIO

Appearance of William Weiseman and Return to the Order to Show Cause..... 278— 832

Application for Order Appointing Conservator ..... 1— 3

Application for Order to Liquidate..... 39— 115

Application for Order to Liquidate..... 465—1393

Clerk's Certificate.....1467—4399

Clerk's Certificate to Judgment Roll.....1445—4333

Complaint (Harold S. Cook)..... 747—2240

Exhibit A. Protective Committee of Stockholders of The Pacific Mutual Life Insurance Company of California, Agreement ..... 763—2287

Complaint in Intervention of Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans..... 606—1817

Complaint in Intervention (E. A. Conway)....1002—3004

Exhibit A. Rehabilitation and Reinsurance Agreement .....1008—3022

Complaint in Intervention (Andrew Copp).. 336—1006

Exhibit A. Insurance Policy..... 352—1054

Complaint in Intervention (J. Parker Evans) .475—1423

Complaint in Intervention of Ralph R. Huesman and Broadtown Investment Company, a Corporation..... 783—2348

PAGE FOLIO

Complaint in Intervention (Edwin Janss, Harold Janss, Gordon B. Kaufmann, Andrew Blackmore, Clifton B. Herd, Fred H. Oliver) ..... 766—2296

Complaint in Intervention (The Pacific Mutual Agency Association) ..... 819—2456

Complaint in Intervention (C. N. Wesley, L. S. Larson, E. H. Miller and George W. Struckman, By Latham, Watkins & Bouchard ..... 538—1613

Complaint in Intervention (Arthur D. Wunner) ..... 644—1931

Complaint in Intervention on Behalf of Shareholders ..... 261— 782

Exhibit A. Protective Committee of Stockholders of The Pacific Mutual Life Insurance Company of California ..... 275— 823

Complaint in Intervention to Set Aside and Vacate All Orders of the Court Made Herein Upon the Petition of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, the Pacific Mutual Life Insurance Company of California, a Corporation, and the Pacific Mutual Life Insurance Company ..... 245— 734

PAGE FOLIO

Complaint in Intervention to Set Aside and Vacate All Orders of the Court Made Herein Upon the Petition of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, The Pacific Mutual Life Insurance Company of California, a Corporation, and The Pacific Mutual Life Insurance Company (Neil S. McCarthy) ..... 418—1252

Complaint in Intervention to Set Aside Order Appointing Conservator and to Disapprove Any Plan Denying Equal Rights to All Policyholders (Ralph C. Hamlin)..... 593—1778

Complaint in Intervention to Set Aside Order of Liquidation, to Set Aside Order Permitting, Approving and Authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of the Pacific Mutual Life Insurance Company of California, and to Strike from the Files of the Court the Complaint in Intervention of the Pacific Mutual Life Insurance Company and to Vacate the Order to Show Cause Granted Thereunder..... 233— 698

Intervening Petition of Wilber G. Katz, Norman Crawford and Robert A. Crawford Objecting to the Plan and Agreement of Rehabilitation and Reinsurance for Respondent Heretofore Presented to the Court..... 427—1279

Exhibit A. Non-Cancellable Income Insurance Policy ..... 437—1309

PAGE FOLIO

Notice of Appeal of Vernon Bettin and William George Dickinson.....1457—4369

Affidavit of Service.....1463—4387

Objections and Answer of Neil S. McCarthy to Petition With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Dated August 14, 1936; Application for Order to Liquidate Dated August 13, 1936; and Order to Show Cause Dated August 14, 1936..... 667—2000

Objections of Roscoe R. Hess to Rehabilitation and Reinsurance Agreement.....1251—3751

Objections of Ben S. Hunter, Appearing in Response to "Order to Show Cause With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement" Dated August 14, 1936..... 662—1985

Objections of Wm. H. Neblett.....1274—3820

Objections to Jurisdiction of Court in Matter of Transfer of Assets and Objections to Rehabilitation Plan..... 285— 854

Objections to New Plan of Rehabilitation and Reinsurance of Respondent Company (Neil S. McCarthy, et al.).....1282—3844

Objections to Plan (William A. Sullivan)....1315—3943

Opinion of the Trial Judge.....1469—4405

Order Amending Order Appointing Conservator and Restraining Order Nunc Pro Tunc ..... 997—2989

PAGE FOLIO

Order Appointing Conservator, Application for ..... 1— 3

Order Appointing Conservator and Restraining Order..... 34— 100

Order Appointing Conservator and Restraining Order ..... 322— 965

Order Approving Amendment of Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement..... 142— 424

Order Approving Rehabilitation and Reinsurance Agreements.....1378—4134

Exhibit A. Rehabilitation and Reinsurance Agreement .....1396—4186

Order Granting E. B. Tilton, Wilber G. Katz and Frank L. Stebbins as a Committee Representing Holders of Non-Cancellable Health and Accident Policies of Respondent, to Intervene in These Proceedings and to Become Additional Parties Petitioner in the Intervening Petition of Wilber G. Katz, Norman Crawford and Robert A. Crawford Heretofore Filed Herein..... 835—2503

Order of Liquidation..... 49— 145

Order Permitting, Approving and Authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of the Pacific Mutual Life Insurance Company of California..... 103— 307

PAGE FOLIO

Order Permitting Intervention and Order to Show Cause ..... 226— 676

Order Ratifying and Confirming Intervention of Pacific Mutual Life Insurance Company, and Ratifying and Confirming Order to Show Cause Issued on Petition for Intervention of Said Pacific Mutual Life Insurance Company ..... 828—2482

Order to Liquidate, Application for ..... 39— 115

Order to Liquidate, Application for ..... 465—1393

Order to Show Cause, Return to, Appearance of William Weiseman ..... 278— 832

Order to Show Cause With Respect to Rehabilitation and Reinsurance ..... 905—2713

Petition for Approval of Amendment of Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement ..... 108— 322

Exhibit A. Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement ..... 110— 329

Petition for Approval of Rehabilitation and Reinsurance Agreement ..... 846—2536

Exhibit "A". Rehabilitation and Reinsurance Agreement ..... 858—2572

Petition for Intervention (R. Rabinowitz) .... 318— 952

PAGE FOLIO

Petition for Intervention and for Order to Show Cause..... 144— 431

Exhibit A. Attached hereto see copy of Rehabilitation, Sale, etc., attached to Petition page..... 110— 329

Exhibit B. Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement ..... 152— 455

Exhibit C. Deed and Bill of Sale..... 183— 547

Exhibit D. Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement as amended July 23, 1936..... 193— 578

Petition for Leave to File Complaint in Intervention (Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans) ..... 600—1799

Affidavit in Support of Petition for Leave to File Complaint in Intervention..... 602—1805

Complaint in Intervention of Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans..... 606—1817

Order Granting Leave to File and Serve Complaint in Intervention..... 604—1812

PAGE FOLIO

Petition for Order Permitting, Approving and Authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of the Pacific Mutual Life Insurance Company of California ..... 53— 157

Exhibit A. Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Concerning the Pacific Mutual Life Insurance Company of California ..... 63— 188

Preliminary Statement ..... 63— 188

Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement ..... 72— 215

Petition in Intervention and Appearance of Certain Policyholders of the Pacific Mutual Life Insurance Company of California 329— 986

Petition in Intervention and Appearance of Certain Policy Holders of the Pacific Mutual Life Insurance Company of California (Charles Ross Cooper, et al.) ..... 1095—3283

Petition of Intervention by Carl C. Katleman, for Himself and All Others Similarly Situated ..... 252— 755

Petition of E. B. Tilton, Wilber G. Katz, and Frank L. Stebbins, as a Committee Representing Holders of Non-Cancellable Health and Accident Policies of Respondent for Leave to Intervene ..... 831—2492

PAGE FOLIO

Petition With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement..... 484—1450

Exhibit A. Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Concerning The Pacific Mutual Life Insurance Company of California—Preliminary Statement..... 497—1490

Plan of Wm. H. Neblett for Pacific Mutual Life Insurance Company of California—Its Liquidation and Sale.....1347—4039

Proposal of Plan of Rehabilitation.....1056—3166

Proposal to Reinsure the Business of The Pacific Mutual Life Insurance Company of California .....1172—3514

Proposal to Reinsure the Business of The Pacific Mutual Life Insurance Company of California as Modified to Conform With Proposed Amendments .....1319—3955

Proposal to Reinsure the Business of The Pacific Mutual Life Insurance Company of California as Modified to Conform With Proposed Amendments .....1350—4048

Proposed Complaint in Intervention, C. N. Wesley, L. S. Larson, et al..... 538—1613

PAGE FOLIO

Response of Wilbur A. Beckett, Wilbur A. Beckett as Executor of the Last Will and Testament of Wesley W. Beckett, Deceased, Citizens National Trust and Savings Bank of Los Angeles, a National Banking Association, as Trustee of Its Private Trust No. 7434 for the Benefit of Francis H. Beckett, Citizens National Trust and Savings Bank of Los Angeles, a National Banking Association, as Trustee of the Trust Created Pursuant to the Provisions of the Last Will and Testament of Iowa A. Beckett, Deceased, for the Benefit of Suzann Beckett, a Minor, and A. J. Beckett to Petition for Intervention and for Order to Show Cause of Pacific Mutual Life Insurance Company, a Corporation, Intervener, and Order to Show Cause Issued by Honorable Douglas L. Edmonds in the Above Entitled Matter on July 23, 1936, Application for Order to Liquidate and Order to Show Cause and Restraining Order Dated August 13, 1936, and Petition With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement, and Order to Show Cause With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Dated August 14, 1936 ..... 804—2411

PAGE FOLIO

Response of George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung, to Order to Show Cause Issued in the Above Entitled Matter on August 13, 1936, Why Order to Liquidate Should Not Be Made ..... 730—2189

Response of George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung to Order to Show Cause and Restraining Order Made in the Above Entitled Matter on August 13, 1936..... 791—2372

Response of George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung to Petition for Intervention and for Order to Show Cause of Pacific Mutual Life Insurance Company, a Corporation, Intervenor, and Order to Show Cause Issued by Honorable Douglas L. Edmonds in the Above Entitled Matter on July 23, 1936 ..... 716—2147

Response of George I. Cochran, W. H. Davis, Douglas E. C. Moore, and Stanley M. McClung to "Petition With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement" and the Order to Show Cause With Respect Thereto ..... 797—2389

Response of George W. Manierre and B. Robert Getts, Respondents, to the Order to Show Cause Dated September 25, 1936..1155—3463

PAGE-FOLIO

Response of R. Rabinowitz to Order to Show Cause Why "Rehabilitation Agreement" Should Not Be Confirmed, and Objections to Confirmation Thereof ..... 589—1766

Response of R. Rabinowitz to Order to Show Cause With Respect to Rehabilitation and Reinsurance, and Objections to Confirmation of Rehabilitation and Reinsurance Agreement ..... 1308—3922

Restraining Order, Order Appointing Conservator ..... 322— 965

Return and Answer of Harold S. Cook to Order to Show Cause ..... 290— 868

Return and Answer of Harold S. Cook to Orders to Show Cause Dated August 13, 1936, and August 14, 1936, Respectively ..... 688—2063

Return of Vernon Bettin and William George Dickinson to Order to Show Cause ..... 681—2041

Return of Vernon Bettin and William George Dickinson to Order to Show Cause ..... 990—2968

Return of Clara Margaret Grannan and Edward Everet White to Order to Show Cause ..... 656—1967

Return of Rex Hardy to Order to Show Cause ..... 1246—3736

Return of Alfred F. MacDonald to Order to Show Cause ..... 626—1876

Return of Alfred F. MacDonald to Order to Show Cause ..... 1233—3698

Return of Austin O. Martin to Order to Show Cause ..... 1241—3721

PAGE FOLIO

Return of John Pleasant Oliver to Order to Show Cause ..... 621—1861

Return of David Lynn Openshaw, Rulon Wall Openshaw, Nod I. Mulville, Gilbert Knudtson, Reuel Leslie Olson, and Delvy Thomas Walton to Order to Show Cause Re Rehabilitation and Reinsurance Agreement ..... 1298—3892

Return of David Lynn Openshaw, Rulon Wall Openshaw, Nod I. Mulville, Gilbert Knudtson, Reuel Leslie Olson, and Delvy Thomas Walton to Order to Show Cause Re Rehabilitation, Sale and Transfer of Assets, etc. ..... 836—2506

Return of Wales Mac Perdue to Order to Show Cause ..... 639—1915

Return of Harry Bryant Robinson, et al., to the Order to Show Cause ..... 1236—3709

Return on Order to Show Cause. Henry B. Senn ..... 1150—3448

Return on Order to Show Cause With Respect to Rehabilitation and Reinsurance of The Pacific Mutual Life Insurance Company of California ..... 1258—3773

Return to Order to Show Cause (Rupert B. Turnbull, William Weisman and Francis Adams) ..... 671—2011

Return to Order to Show Cause by the Respondents Rupert B. Turnbull, William Weisman, Francis Adams, and Lawrence Allen ..... 1145—3433

	Page
Proceedings in Supreme Court of California	1509
Opinion by the Court	1509
Order denying petition for rehearing	1545
Clerk's certificate	1545
Order allowing certiorari	1546

No. 404673

In the Superior Court

of the

State of California,

IN AND FOR THE COUNTY OF LOS ANGELES.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California,

Petitioner,

vs.

The Pacific Mutual Life Insurance Company of California, a corporation,

Respondent.

Application for Order Appointing Conservator.

3

Comes now Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, and for cause of action against respondent alleges:

I.

That petitioner is the duly appointed, qualified and acting Insurance Commisisoner of the State of California.

II.

That the respondent, The Pacific Mutual Life Insurance Company of California, a corporation, now is and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, and is engaged in the business of life, and health, and accident insurance in the State of California, under a certificate of authority issued by petitioner as Insurance Commissioner of the State of California; that respondent corporation is also engaged in the business of life, and health, and accident insurance in numerous other states of the United States, pursuant to authority granted to it by the various insurance regulatory boards and officers of said states; that respondent corporation has assets in the State of California and in numerous other states of the United States; that the office where respondent corporation's principal business is transacted is in the City of Los Angeles, County of Los Angeles, State of California

III.

That at all times herein mentioned said respondent corporation has been subject to examination by the Insurance Commissioner of the State of California and is required to have a certificate of authority for the transaction of business from said Insurance Commissioner.

IV.

That petitioner together with a number of other insurance commissioners of states in which respondent corporation transacts its business have made a convention examination of the business and affairs of respondent corporation as of December 31, 1935, and in connection therewith petitioner and said other commissioners have joined in a report of such examination, a certified copy of which is attached hereto, marked Exhibit "A" and made a part hereof.

That said examination and report shows that respondent corporation is in such condition that its further transaction of business will be hazardous to its policy holders, its creditors and to the public; that said examination and report further shows that respondent corporation is insolvent within the meaning of article 13, chapter 1, part 2, division 1, of the Insurance Code of the State of California; that respondent corporation's said hazardous and insolvent condition is principally caused, among other things, by reason of the fact that respondent corporation has for a considerable number of years last past issued a large number of non-cancellable accident and health policies at a premium rate which was and is now entirely inadequate to maintain the reserves required by law to mature said policy obligations.

V.

That it is necessary and proper that your petitioner be authorized and directed to immediately take and retain title and possession of all of respondent's books, records, property, both real and personal, and assets wheresoever situated, for the purpose of conserving same in the interest of all of respondent's policy holders, creditors, stockholders and the public in general; that petitioner be appointed conservator of respondent corporation; that he be authorized and directed as such conservator to conduct the business of respondent corporation; that respondent and all of its officers, agents and employees be ordered to immediately deliver into the possession of petitioner all of the property and assets of respondent; and that all officers, agents and employees of respondent be forthwith enjoined from further transacting business and from disposing of any of the property of respondent.

VI.

That your petitioner is informed and believes and therefore alleges that various actions, suits and proceedings to which respondent is a party, have been filed and are pending in the courts of the State of California, and in various other states in which respondent corporation is transacting business involving various alleged obligations of respondent, and that irreparable loss and

injury will be suffered by respondent, by its contract holders, by its creditors, by its stockholders and by the public in general unless the prosecution of said actions, suits and proceedings, and all legal process incident thereto, is enjoined until petitioner is herein appointed as Conservator of the business and affairs of respondent, and given reasonable opportunity to become advised of the issues involved in said actions, suits and proceedings, and with the interest of respondent and of its contract holders and creditors with respect to said issues.

VII.

That it is necessary and proper that all claimants against said respondent and all other persons be enjoined from instituting or maintaining any action or suit or proceeding upon any property of respondent, wheresoever situated, from taking any other legal steps or proceedings against any such property of respondent, and from doing any act interfering in any way with the assumption and retention of the title and possession of respondent's said property by petitioner, or with the conservation, conduct and administration of the business and affairs of the respondent.

VIII.

That respondent corporation has assets in excess of two hundred million dollars ($200,000,000), and has obligations on policies issued and

outstanding in excess of six hundred million dollars ($600,000,000) insuring the lives and condition of health of approximately two hundred thousand (200,000) or more persons; that respondent corporation also has accident and health policies outstanding insuring approximately an additional seventy-five thousand (75,000) persons; that by reason of the magnitude of the business of respondent corporation, and the enormous number of policy holders and creditors involved, and the *fact* that immediate liquidation of the assets of respondent corporation would have upon the insurance business in general, it is proper, as a matter of public policy, that your petitioner be authorized and directed to ascertain and endeavor to work out a rehabilitation and/or reinsurance plan or agreement concerning respondent corporation in order that the policy holders and creditors, stockholders and the public in general may have their rights protected and fairly and equitably adjusted.

Wherefore, petitioner prays that an order be made

(1) Directing petitioner forthwith to take title and possession of all of respondent's books,

records, property, both real and personal, and assets of said respondent corporation wheresoever situated;

(2) That title to all of the said property and assets of said respondent, wheresoever situated, be vested in petitioner, or his successor in office in his official capacity, and all persons be enjoined and restrained from interfering with petitioner's possession and title thereto;

(3) Appointing petitioner conservator of respondent corporation and directing him as such conservator to conduct the business of respondent corporation;

(4) That said respondent corporation, its officers, directors, agents, servants and employees be restrained and enjoined from transacting any of the business of respondent corporation, or disposing of any of its property or assets until the further order of the court;

(5) That all creditors of respondent corporation, all claimants against said respondent, and all other persons, be enjoined from instituting or maintaining any suit or proceeding at law or in equity against said respondent, and from attaching or executing upon, or taking any other legal step or proceeding against any of the property

of respondent corporation, and from doing any act interfering with the possession and administration by petitioner of said property;

(6) Directing petitioner to formulate, work out and prepare a rehabilitation and/or reinsurance plan or agreement concerning respondent corporation which, in the judgment of petitioner, will most fairly and equitably protect and adjust the rights, obligations and liabilities of all persons concerned in the assets, business and affairs of respondent corporation, and that when said rehabilitation and/or reinsurance plan or agreement is formulated and prepared, it be submitted to the above entitled court for its approval; and

(7) For such other and further relief as this court may deem meet and proper.

Dated: Los Angeles, California, July 22, 1936.

SAMUEL L. CARPENTER, JR.
Insurance Commissioner of the State of California.

Petitioner.

U. S. WEBB,
Attorney General,
By: JOHN L. FLYNN,
Deputy Attorney General
Attorneys for Petitioner.

State of California, County of Los Angeles—ss.

Samuel L. Carpenter, Jr., being first duly sworn, on oath says:

That he is the Insurance Commissioner of the State of California; that he has read the within Petition and knows the contents thereof; and that the same is true of his own knowledge except as to the matters and things therein stated on his information or belief, and that as to those matters and things he believes it to be true.

SAMUEL L. CARPENTER, JR.

Subscribed and sworn to before me this 22 day of July, 1936.

[Seal] KATHRYN BUCKMAN,
Notary Public in and for said County and State

Memorandum of Points and Authorities.

I.

Where the Insurance Commissioner finds, after examination, that an insurance company is in a hazardous condition, he may apply for his appointment as conservator of said company.

Section 1011 Insurance Code.

II.

All persons or companies engaging in insurance business, subject to examination by the Insurance Commissioner, are subject to the provisions of article 14, chapter 1, part 2, division 1 of the Insurance Code.

III.

Upon the appointment of a conservator, the court shall enjoin and restrain all persons from interfering with the Insurance Commissioner in the operation, management and conduct of the business and affairs of said insurance company.

Section 1020 Insurance Code.

Respectfully submitted,

U. S. WEBB,
Attorney General,

By: JOHN L. FLYNN,
Deputy Attorney General
Attorneys for Petitioner.

State of California
Department of Investment
Division of Insurance
San Francisco

Los Angeles, July 22, 1936.

I, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, do hereby certify that I have compared the annexed copy of report of examination of The Pacific Mutual Life Insurance Company of California, of Los Angeles, California with the original on file in my office, and that the same is a full, true and correct transcript thereof, and of the whole of said original.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

SAMUEL L. CARPENTER, JR.,
Insurance Commissioner.

By H. F. RISBROUGH,
Deputy.

34 Los Angeles, California
July 21, 1936

Hon. Jess G. Read
Chairman, Committee on Examinations
National Association of Insurance Commissioners
Oklahoma City, Oklahoma

Hon. Samuel L. Carpenter, Jr.
Insurance Commissioner
San Francisco, California

Hon. E. A. Conway
Secretary of State
Baton Rouge, Louisiana

35 Hon. Robert L. Bowen
Superintendent of Insurance
Columbus, Ohio

Hon. R. L. Daniel
Chairman, Board of Insurance Commissioners
Austin, Texas

Hon. George A. Bowles
Superintendent of Insurance
Richmond, Virginia

Hon. William A. Sullivan
Insurance Commissioner
Olympia, Washington

36 Sirs:

Pursuant to your direction, the undersigned examiners have made an examination of the accounts and financial condition of

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

with home office at Los Angeles, California, and are showing herewith the financial statement compiled.

37 FINANCIAL STATEMENT

We herewith present separately for the Life and Accident Departments statements of Income and Disbursements for the year 1935 and a consolidated statement of Assets and Liabilities as of December 31, 1935.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

FINANCIAL STATEMENT

as of

DECEMBER 31, 1935

LIFE DEPARTMENT

CAPITAL STOCK

38	Amount of Capital paid up December 31 of current year	$508,200.00	
	Amount of ledger assets (as per balance) December 31 of previous year	$172,568,589.32	
	Increase of paid-up capital during the year (transferred from Accident Department)	224,100.00	
	Extended at		$172,792,689.32

INCOME

		Gross Premiums less Reinsurance		
		First Year	Renewal	
39	Life	$1,713,948.76	$16,378,312.53	
	Disability Benefits	69,006.10	695,100.00	
	Annuities	3,394,834.17	2,169,635.15	
	Dividends applied to pay renewal premiums	160,569.16	869,011.72	
	TOTALS	$5,338,358.19	$20,112,059.40	25,450,417.59
	Consideration for supplementary contracts involving life contingencies			456,178.91
	Consideration for supplementary contracts not involving life contingencies including $0.00 disability			1,057,089.37
	Dividends left with the Company to accumulate at interest			600,497.79

40	**Interest, Dividends and Rents:**		
	Gross interest on mortgage loans, less $11,799.53 accrued interest on mortgages acquired during the year	$3,329,773.48	
	Gross interest on collateral loans	174,588.36	
	Gross interest on bonds, $1,928,214.36, and dividends on stocks $246,642.72 less $185,176.65 accrued interest on bonds acquired during the year	1,989,680.43	
	Gross interest on premium notes, policy loans and liens	2,137,625.21	
	Gross interest on deposits in trust companies and banks	22,751.45	
	Gross interest on other debts due the Company:		
	Agents' balances	11,709.71	
	Unlisted assets	9,799.28	
41	Gross rent from Company's property, including $298,918.00 for Company's occupancy of its own buildings (being $262,015.80 for Life and $36,902.20 for Accident Departments) less $0.00 interest on incumbrances	1,100,254.36	
	Total Interest, Dividends and Rents		$ 8,776,182.28
	Income from other sources:		
	Unlisted assets	101,790.44	
	Return premiums disclaimed	475.07	
	Written off checks	2,214.32	
	Income from property sold in previous years	375.00	
	Bonus on investments	29,992.56	134,847.39
	From Agents' balances previously charged off		344.58
42	Suspense accounts awaiting adjustment		95,145.81
	Gross profit on sale or maturity of ledger assets, viz:		
	Real estate	$ 30,383.39	
	Bonds	337,117.72	
	Stocks	51,891.20	419,392.31
	Gross increase, by adjustment in book value of ledger assets, viz:		
	Bonds	13,409.91	
	Collateral loans—restored from unlisted assets—now fully secured	143,858.36	157,268.27
	TOTAL INCOME		$ 37,147,364.30
	AMOUNT CARRIED FORWARD		$209,940,053.62

43 Amount brought forward $209,940,053.62

DISBURSEMENTS

	Gross Amount	Deduct Reinsurance	
Death claims	$6,077,430.03	$ 396,630.00	$5,680,800.03
Matured endowments	759,880.00	0.00	759,880.00
Permanent and total disability:			
Payments made	1,287,563.88	4,080.00	1,283,483.88
Premiums waived	262,738.99	662.12	262,076.87
TOTALS	$8,387,612.90	$ 401,372.12	$7,986,240.78

For annuities involving life contingencies, excluding payments on supplementary contracts (including cash refund payments)		1,144,948.66	
Surrender values		7,231,184.47	
44 Dividends to policyholders:			
Applied to pay renewal premiums	$ 869,011.72		
Applied to purchase paid up additions and annuities	160,569.16		
	$1,029,580.88		
Paid in cash or applied in liquidation of loans or notes	141,531.39		
Left with the Company to accumulate at interest	600,497.79	1,771,610.06	
Total paid policyholders			$ 18,133,983.97
Paid for claims on supplementary contracts:			
Involving life contingencies		239,957.86	
Not involving life contingencies		819,612.21	1,059,570.07
Dividends and interest thereon held on deposit:			
45 Surrendered during year:			
Dividends	$ 408,919.06		
Interest	78,641.13	487,560.19	
Applied during year to shorten endowment or premium paying period:			
Dividends	37,842.03		
Interest	16,260.49	54,102.52	541,662.71
#Expense of investigation and settlement of policy claims, including $30,903.93 for legal expenses			192,374.10
Commissions to agents (less commissions on reinsurance):			
First year's premiums		921,635.16	
Renewal premiums		1,108,565.08	
Annuities (original)		297,984.17	
Annuities (renewal)		150,113.99	2,478,298.40
Commuted renewal commissions			25,060.75
*Compensation of managers and agents not paid by commission for services in obtaining new insurance			221,612.01

46	Agency supervision and traveling expenses of supervisors (except compensation for home office supervision)		$ 40,038.80
	Branch office expenses, including salaries of managers and clerks not included in item * above		164,626.69
	Medical examiners' fees	$ 87,167.09	
	Inspection of risks	39,089.13	126,256.22
	Salaries and all other compensation of officers, directors, trustees and home office employees		921,733.97
	Payments to inactive employees		7,425.00
	Home office travel		15,800.02
	Rent, including $176,888.00 for Company's occupancy of its own buildings, less $0.00 received under sublease		191,138.00
	Miscellaneous Expenses:		
47	Bureau and association dues and expenses	$ 6,060.48	
	Legal expenses not included in item # on preceding page	6,883.66	
	Furniture and fixtures	28,976.39	
	Printing and stationery	55,723.63	
	Books, newspapers and periodicals	4,024.01	
	Postage, express, telegraph, telephone and exchange	35,209.26	
	Advertising	42,048.68	
	Insurance except on real estate	5,052.34	
	General office maintenance and expense	692.19	
	Contributions	21,329.27	
	Legislative expense	4,706.07	
	Employees' insurance	$ 4,826.86	
	Lunches	32,980.21	
48	Health and welfare	10,485.31	48,292.38
	Insurance Department examinations	401.40	
	General audits	16,111.97	16,513.37
	Contributions to employees' stock syndicate	7,998.98	283,510.71
	Taxes, licenses and fees:		
	State taxes on premiums	$ 386,728.30	
	Insurance Department	10,609.40	
	Other state taxes	489.74	
	Federal	112,657.71	
	All other (except on real estate)	11,910.46	522,395.61

49	Real Estate:		
	Repairs and expenses	509,092.95	
	Taxes	199,728.17	708,821.12
	Paid stockholders for dividends (cash)		127,050.00
	Agents' balances charged off		31,021.04
	Outlay on unlisted assets	39.25	
	Loss on deposits in suspended banks	69.06	108.31
	Miscellaneous investment expenses (less $67,098.63 recovered from previous year)		268,981.23
	Stockholders' surplus transferred to Accident Department		200,000.00
	Suspense accounts adjusted	$ 11,386.06	
	Paid on return premiums disclaimed	1,449.18	12,835.24
50	Gross loss on sale or maturity of ledger assets, viz:		
	Real estate	$ 24,472.21	
	Bonds	32,586.45	
	Stocks	8,766.71	
	Mortgage loans	2,836.57	$ 68,661.94
	Gross decrease by adjustment, in book value of ledger assets, viz:		
	Real estate	$ 27,397.05	
	Bonds (including $40,388.54 for amortization of premiums)	175,432.94	
	Stocks	148,390.30	
	Collateral loans	7,700.00	358,920.29
	TOTAL DISBURSEMENTS		$ 26,701,886.20
51	BALANCE		$183,238,167.42

52 THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

FINANCIAL STATEMENT

as of

DECEMBER 31, 1935

ACCIDENT DEPARTMENT

CAPITAL STOCK

Amount of Capital Paid up December 31 of current year	$508,200.00	
Amount of ledger assets (as per balance), December 31 of previous year	$27,552,866.23	
Decrease of paid up capital during the year	224,100.00	
53 Extended at		$27,328,766.23

INCOME

	Return Premiums on Policies Cancelled (Written Basis)	Reinsurance (Written Basis)	Net Premiums	
Accident	$418,446.46	$34,182.80	$1,896,795.97	
Health	93,639.69	4,952.30	611,716.67	
Non-Cancellable Accident and Health	323,388.80	0.00	3,557,740.95	
Totals	$835,474.95	$39,135.10	$6,066,253.59	$ 6,066,253.59

54 Gross interest on mortgage loans, less $0.00 accrued interest on mortgages acquired during the year	$ 957,511.91	
Gross interest on bonds $375,571.18 and dividends on stocks $17,056.50 less $19,276.49 accrued interest on bonds acquired during the year	373,351.19	
Gross interest on miscellaneous accounts	7,137.22	
Gross interest on employees' stock purchase plan	10,054.89	
Gross rents from Company's property, including $0.00 for Company's occupancy of its own building, less $0.00 interest on incumbrances	48,936.97	
Total Interest and Rents		$ 1,396,992.18

55 Income from Other Sources:

Return premiums disclaimed	$ 6,458.72	
Written off checks	92.80	
Suspense accounts awaiting adjustment	4,320.49	
Income other than rent from properties	2,245.25	
Consideration for supplementary contracts	51,475.86	
Bonus on investments	1,099.40	
'Stockholders' surplus transferred from Life Department'	200,000.00	$ 265,691.72
From agents' balances previously charged off		$ 40.13
Gross profit on sale or maturity of ledger assets, viz: Bonds		100,032.00
Gross increase in adjustment in book value of ledger assets, viz: Bonds (including $10,260.28 for accrual of discount)		10,356.48
TOTAL INCOME		7,839,366.10
AMOUNT CARRIED FORWARD		$35,168,132.33

56

DISBURSEMENTS

Amount brought forward $35,168,132.33

	Gross Amount paid for losses	Reinsurance	Net amount paid policyholders for losses	
Accident	$ 717,528.03	$27,946.26	$ 689,581.77	
Health	376,743.18	6,079.49	370,663.69	
Non-cancellable Accident and Health	$4,528,186.10	0.00	4,528,186.10	
Totals	$5,622,457.31	$34,025.75	$5,588,431.56	$ 5,588,431.56

57 Investigation and adjustment of claims:

Accident	$ 51,950.23	
Health	27,924.05	
Non-cancellable accident and health	314,702.63	394,576.91

Commissions or brokerage, less amount received on return premiums and reinsurance:

Accident	$514,517.86	
Health	128,768.38	
Non-cancellable accident and health	588,979.87	$1,232,266.11
Salaries and all other compensation of officers, directors, trustees and home office employees		196,152.43
Payments to inactive employees		2,000.00
Home office travel		4,982.35
Agency supervision and traveling expenses of supervisors		18,126.02

58	Salaries, traveling and all other expenses of agents not paid by commissions		20,083.24	
	Salaries, traveling and all other expenses of branch office employees and agents not paid by commissions		55,811.14	
	Medical examiners' fees and salaries		27,519.22	
	Inspections, including accident prevention		11,432.69	
	Rents, including $36,827.00 for company's occupancy of its own buildings, less amounts included in other items		16,332.00	
	Taxes, licenses and fees:			
	State taxes on premiums	$104,914.82		
	Insurance department	1,974.59		
	Other state taxes	169.26		
	Federal	55,551.76		
	All other (except on real estate)	2,615.82	$ 165,226.25	
59	Legal expenses $2154.08; advertising $12,617.14; printing and stationery $6,541.08		21,312.30	
	Postage, telegraph, telephone, exchange and express $3762.95; insurance $347.12		4,110.07	
	Furniture and Fixtures $5512.44; books, newspapers and periodicals $369.77		5,882.21	
	Bureau and Association dues and assessments		2,736.18	
	Miscellaneous underwriting expense:			
	Employees' insurance	$ 779.26		
	Employees' lunches	4,389.50		
	Health and welfare	1,755.11		
	Insurance Department examinations	44.60		
	Contributions	3,471.27		
	General audits	2,622.87		
	Contributions to employees' stock syndicate	1,302.18	14,364.79	$ 1,798,337.00
	Real estate:			
60	(a) Repairs and expenses		38,514.45	
	(b) Taxes		41,212.33	79,726.78
	Miscellaneous investment expense:			
	Miscellaneous interest		12,730.42	
	Investment expenses (less $29,088.00 recovered from previous years)		— 8,278.56	4,451.86
	Paid on supplementary contracts			45,296.09
	Agents' balances charged off			1,552.56
	Gross loss on sale or maturity of ledger assets, viz: Stocks			3,538.01
	Gross decrease, by adjustment, in book value of ledger assets, viz: Bonds (including $373.49 for amortization of premiums)			416.76
	TOTAL DISBURSEMENTS			7,916,327.53
	BALANCE			$27,251,804.80

61

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

COMBINED STATEMENT OF ASSETS AND LIABILITIES

as of

DECEMBER 31, 1935

ASSETS

LEDGER ASSETS	Life Department	Accident Department	Total
Book value of real estate	$ 15,411,692.30	$ 2,612,846.75	$ 18,024,539.05
Mortgage loans on real estate	71,402,104.61	16,977,208.24	88,379,312.85
Loans secured by pledge of bonds, stocks or other collateral	4,309,672.98	0.00	4,309,672.98
Loans made to policyholders on this Company's policies assigned as collateral	33,207,147.08		33,207,147.08
Premium notes on policies in force	2,785,607.60		2,785,607.60
Book value of bonds	47,270,658.44	4,429,363.86	51,700,022.30
Book value of stocks	4,282,837.31	2,141,559.05	6,424,396.36
Cash in Company's office	5,394.61	3,305.39	8,700.00
Deposits in trust companies and banks, not on interest	2,581,477.65	24,850.29	2,606,327.94
Deposits in trust companies and banks, on interest	1,725,000.00		1,725,000.00
Deposits in suspended banks	35,659.28	3,542.09	39,201.37
Bills receivable	14,374.92	625.03	14,999.95
Agents' balances	206,540.64	29,004.13	235,544.77
Gross premiums, less return premiums and reinsurance, in course of collection		727,929.32	727,929.32
Due for reinsurance on paid losses		680.74	680.74
Employees' stock purchase plan		300,889.91	300,889.91
TOTAL LEDGER ASSETS	$183,238,167.42	$27,251,804.80	$210,489,972.22

63

NON-LEDGER ASSETS			
Interest due $145,628.50 and accrued $707,871.01 on mortgages	$ 678,993.06	$ 174,506.45	$ 853,499.51
Interest due $0.00 and accrued $25,760.68 on collateral loans	25,760.68		25,760.68
Interest due $899,554.03 and accrued $328,015.80 on premium notes, policy loans or liens	1,227,569.83		1,227,569.83
Interest due $0.00 and accrued $612,896.77 on bonds not in default	548,069.47	64,827.30	612,896.77
Interest due $0.00 and accrued $8,570.83 on deposits in banks	8,570.83		8,570.83
Dividends in course of transmission	875.00	4,687.50	5,562.50
Rents due $10,204.32 and accrued $1,411.59	10,370.91	1,245.00	11,615.91
Total interest and rents due and accrued	2,500,209.78	245,266.25	2,745,476.03

	NON-LEDGER ASSETS—Continued	Life Department	Accident Department	Total
64	Due from other companies for paid losses or claims on policies of this company, reinsured	$ 11,447.00	$	$ 11,447.00
	Premiums due and unreported on policies in force 12-31-35 less re-insurance (net)	3,379,076.89		3,379,076.89
	Market value of stocks over book value	221,708.44	88,440.95	310,149.39
	GROSS ASSETS	$189,350,609.53	$27,585,512.00	$216,936,121.53
65	DEDUCT: ASSETS NOT ADMITTED			
	Agents' debit balances	235,325.34	35,327.55	270,652.89
	Bills receivable	14,374.92	625.03	14,999.95
	Premium notes, policy loans and other policy assets in excess of net value and of other liabilities on individual policies	5,000.00		5,000.00
	Deposits in suspended banks, less $2,181.10 estimated amount recoverable	33,515.93	3,504.34	37,020.27
66	Gross premiums in course of collection effective prior to October 1, 1935		2,787.43	2,787.43
	Employees' stock purchase plan over par value of stock held as security		284,856.91	284,856.91
	Book value of bonds over market value $1,386,004.54 less $1,231.41 amortization adjustment	1,169,170.74	215,602.39	1,384,773.13
	Increase in book value due to interdepartmental profit on transfer of securities		18,828.85	18,828.85
	Total assets not admitted	1,457,386.93	561,532.50	2,018,919.43
	ADMITTED ASSETS	$187,893,222.60	$27,023,979.50	$214,917,202.10

67 LIABILITIES, SURPLUS AND OTHER FUNDS

Net present value of all outstanding policies in force Dec. 31, 1935 as computed on the following tables of mortality:			
Actuaries' table at 4% on all policies issued prior to Jan. 1, 1901	$ 1,508,595.00		$ 1,508,595.00
American Experience table at 3½% on all non-participating policies issued since Dec. 31, 1900 and on all participating policies issued between Jan. 1, 1901 and Dec. 31, 1907, inclusive, except a few annual dividend policies of 1907, and on all participating insurance issued after Jan. 1, 1918	115,069,140.00		115,069,140.00
American Experience table at 3% on a few annual dividend policies issued in 1907 and on all participating policies issued between Jan. 1, 1908 and Dec. 31, 1917 inclusive	11,701,768.00		11,701,768.00
Sesqui-American Experience table at 3½%	955,235.00		955,235.00
Double American Experience table at 3½%	259,070.00		259,070.00

68

69

	Life Department	Accident Department	Total
Net present value of annuities (including those in reduction of premiums):			
Actuaries' table at 4%	$ 14,792.00	$	$ 14,792.00
McClintock's table at 3½%	5,885,747.00		5,885,747.00
American Experience table at 3½%	15,508,363.00		15,508,363.00
Combined annuitants' table at 3½%	4,066,510.00		4,066,510.00
American Experience table at 3%	231,211.00		231,211.00
Total	155,200,431.00		155,200,431.00

70	Deduct net value of risks reinsured in other solvent companies	211,231.00		211,231.00
	Net reserve (paid-for basis) excluding disability	154,989,200.00		154,989,200.00
	Reserve for total and permanent disability benefits included in life and annuity contracts: active lives $3,225,863.00, less $0.00 reinsurance; disabled lives $6,927,457.00, less $32,664.00 reinsurance	10,120,656.00		10,120,656.00
71	Present value of amounts not yet due on supplementary contracts not involving life contingencies, excluding disability claims	5,718,710.00		5,718,710.00

Policy claims and losses outstanding:

Life Department

	Net reported outstanding policy claims and losses, less reinsurance	Estimated net losses incurred but not yet reported	Total liability for outstanding policy claims and losses
Death	$ 625,623.00	$ 46,000.00	$ 671,623.00
Disability Benefits	546,173.00	100,000.00	646,173.00
72 Matured Endowments	5,233.00	0.00	5,233.00
Annuities involving life contingencies	20,529.00	0.00	20,529.00
Totals	$ 1,197,558.00	$146,000.00	$ 1,343,558.00

78 Accident Department

	Net unpaid claims excluding incurred but not reported, less reinsurance	Incurred but not reported	Total unpaid accident and health claims
Accident	$ 245,580.00	$ 65,000.00	310.580.00
Health	344,598.00	35,000.00	379,598.00
Non-cancellable accident and health	19,443,031.00	200,000.00	19,643,031.00
Totals	$20,033,209.00	$300,000.00	$20,333,209.00

74

Total losses and claims, as above	$ 1,343,558.00	$20,333,209.00	$ 21,676,767.00

	Life Department	Accident Department	Total
Due and unpaid on supplementary contracts not involving life contingencies	$ 2,928.44	$	$ 2,928.44
Dividends left with Company to accumulate at interest, and accrued interest thereon	4,251,237.00		4,251,237.00
Gross premiums paid in advance, including surrender values so applied, less discount, if any	1,177,534.00		1,177,534.00
75 Estimated expenses of investigation and adjustment of claims		863,339.00	863,339.00
Unearned premium reserve—Accident Dept.		2,903,928.12	2,903,928.12
*Additional reserve on non-cancellable accident and health policies		24,685,977.00	24,685,977.00
Unearned interest and rent paid in advance	616,363.87	1,217.10	617,580.97
Commissions due or accrued: life $19,828.78, accident $77,957.00, health $26,443.00, non-cancellable accident and health $35,626.00	19,828.78	140,026.00	159,854.78
Salaries, rents, expenses, bills, etc., due or accrued	30,000.00	19,037.81	49,037.81

76	Medical examiners' fees	20,229.00		20,229.00
	Inspection of risks	1,227.00		1,227.00
	Legal fees	10,050.00		10,050.00
	Estimated amount hereafter payable for federal, state and other taxes	570,560.52	204,223.27	774,783.79
	Dividends or other profits due policyholders, including those contingent on payment of outstanding and deferred premiums	59,800.00		59,800.00
77	Dividends declared on or apportioned to ANNUAL DIVIDEND policies payable to policyholders to and including June 30, 1936, whether contingent upon the payment of renewal premiums or otherwise	943,600.00		943,600.00
	Dividends declared on or apportioned to DEFERRED DIVIDEND policies payable to policyholders to and including Dec. 31, 1936	18,625.44		18,625.44
	Amounts set apart, apportioned, provisionally ascertained, calculated, declared or held awaiting apportionment upon DEFERRED DIVIDEND policies, not included above	46,644.00		46,644.00
	Reserve for supplementary contracts		$ 185,562.00	185,562.00
	Reserve for return premiums held in abeyance		14,510.41	14,510.41
	Reserve for mortgage loans	1,022,724.94	130,000.00	1,152,724.94
78	Reserve for collateral loans	660,625.00		660,625.00
	Reserve for real estate	420,000.00	310,000.00	730,000.00
	Renewal bonus fund	22,644.00		22,644.00
	Policy liabilities, address of payee unknown	16,134.80		16,134.80
	Funds in suspense	95,145.81	4,320.49	99,466.30
	TOTAL LIABILITIES	$182,178,026.60	$49,795,350.20	$231,973,376.80
	Capital paid up	254,100.00	254,100.00	508,200.00
	Unassigned funds; Surplus	5,461,096.00	23,025,470.70#	17,564,374.70#
	TOTAL	$187,893,222.60	$27,023,979.50	$214,917,202.10

*See concluding paragraph.

#Deficit.

PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

ANALYSIS OF CHANGES IN SURPLUS DUE TO EXAMINERS' ADJUSTMENTS AND DIVISION OF SURPLUS OR DEFICIT BETWEEN PARTICIPATING AND NON-PARTICIPATING BUSINESS

DECEMBER 31, 1935

LIFE DEPARTMENT	Per Company	Per Examiners	Participating Decrease	Participating Increase	Non-Participating Decrease	Non-Participating Increase
Interest due and accrued on Mortgages	$ 748,596.92	$ 678,993.06	$ 49,905.97	$	$ 19,697.89	$
Interest due and accrued on premium notes, policy loans and liens	1,235,074.15	1,227,569.83	5,380.60		2,123.72	
Interest due and accrued on bonds	552,776.97	548,069.47	3,389.40		1,318.10	
Market value of stocks over book value	0.00	221,708.44		159,630.08		62,078.36
Book value of bonds over market value, less amortization adjustments	740,932.15	1,169,170.74	308,331.78		119,906.81	
Deposits in suspended banks, less $2143.35 estimated amount recoverable	35,170.64	33,515.93		1,191.39		463.32
Reserve for total permanent disability, active lines	3,050,863.00	3,225,863.00	123,375.00		51,625.00	

27

	84	83		82	
Policy claims and losses outstanding	1,534,308.00	1,343,558.00		132,742.93	58,007.07
Unearned interest on mortgage gage loans paid in advance	548.78	854.65	220.23	85.64	
Estimated amount hereafter payable for Federal and State taxes	461,700.00	570,560.52	76,746.67	32,113.85	
Reserve for contingencies	2,846,519.00	0.00	2,041,093.60		805,425.40
Special contingency reserve	660,625.00	0.00	473,700.50		186,924.50
Reserve for collateral loans	0.00	660,625.00	473,700.50	186,924.50	
Reserve for mortgage loans	0.00	1,022,724.94	736,361.96	286,362.98	
Reserve for real estate	0.00	420,000.00	302,400.00	117,600.00	
Totals			$2,079,812.11	$2,808,358.50	$ 817,758.49 $1,112,898.65
Deduct decreases				2,079,812.11	817,758.49
Net increase—Life Department				728,546.39	295,140.16
Surplus per annual statement—Life Department				4,063,572.58	373,836.87
Surplus per Examiners—Life Department, carried forward				$4,792,118.97	$ 668,977.03

Brought forward			$4,792,118.97		$ 668,977.03	
ACCIDENT DEPARTMENT	Per Company	Per Examiner	Participating Decrease	Participating Increase	Non-Participating Decrease	Non-Participating Increase
Interest due and accrued on mortgages	$ 198,613.45	$ 174,506.45	$	$	$ 24,107.00	$
Interest due and accrued on bonds not in default	65,215.06	64,827.30			387.76	
Market value of stocks over book value	0.00	88,440.95				88,440.95
Agents' debit balances	33,472.93	35,327.55			1,854.62	
Book value of bonds over market value	0.00	215,602.39			215,602.39	
Employees' stock purchase plan over par value of security	99,986.03	284,856.91			814,870.88	
Deposits in suspended banks, less $37.75 estimated amount recoverable	3,387.79	3,504.34			116.55	
Asset not admitted: increase in book value due to interdepartmental profit in transfer of securities	0.00	18,828.85			18,828.85	
Losses and claims:						
Accident	281,380.00	310,580.00			29,200.00	
Health	349,068.00	379,598.00			30,530.00	
Non-can. accident and health	15,946,510.00	19,643,031.00			3,696,521.00	
Estimated expenses of investigation and adjustment of claims	437,338.00	863,339.00			426,001.00	

Additional reserve for non-can. accident and health	4,550,848.00	24,685,977.00		20,135,129.00	
Commissions due and to become due	138,526.00	140,026.00		1,500.00	
Salaries, rents, expenses, etc. due or accrued	16,000.00	19,037.81		3,037.81	
Estimated amount hereafter payable for Federal and State taxes	185,100.00	204,223.27		19,123.27	
Unearned interest and rents paid in advance	1,079.05	1,217.10		138.05	
Reserve for contingencies	492,856.00	0.00			492,856.00
Reserve for mortgage loans	0.00	130,000.00		130,000.00	
Reserve for real estate	0.00	310,000.00		310,000.00	
Totals				$25,226,948.18	$581,296.95
Deduct increases				$581,296.95	
Net decrease—Accident Department				24,645,651.23	
Surplus per annual statement—Accident Department				1,620,180.53	
Deficit per Examiners—Accident Department				23,025,470.70	
Surplus per Examiners—Participating Division			$4,792,118.97		
Deficit per Examiners—Non-Participating Division				$22,356,493.67	

91 While the difficulties in which this Company finds itself is due principally to inadequate rates on non-cancellable accident and health policies a considerable portion could have been alleviated by the executive officers of the Company following the advice of the Company Actuaries as early as 1926, when they advised that the basis of calculation of non-cancellable
92 accident and health reserves was inadequate.

Also, considerable money was lost through a stock syndicate for employees and the making of loans to companies in which certain of the officers were interested.

These matters should all be investigated.

As you will note from the foregoing balance sheet the liabilities exceed the assets for the
93 combined departments by the sum of $17,-564,374.70.

In considering the departments separately you will note that the participating department shows a surplus of $4,792,118.97 and the non-participating department, including all accident

22,356,493.67

and health business a deficit of ~~$23,025,470.70.~~

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208

69-83

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94 From a survey of the above figures it is apparent that immediate action must be taken to protect policyholders.

Respectfully submitted,

R. M. MEYER,
Principal Examiner—State of California;

CARL E. HERFURT,
Actuary—State of California;

95 THOMAS F. BIENVENN,
Examiner—State of Louisiana;

E. E. COLTRIN,
Examiner—State of Ohio;

HOMER SANDERFORD,
Examiner—State of Texas;

C. B. COULBOURN,
Actuary—State of Virginia;

F. E. HUSTON,
96 Actuary—State of Washington.

Endorsed: Filed Jul. 22, 1936. L. E. Lampton, county clerk; M. E. Howard, deputy.

97 [TITLE OF COURT AND CAUSE.]

Appearance and Answer Re Application for Order Appointing Conservator.

Comes now the respondent in the above entitled cause and enters its voluntary appearance herein and consents that this cause may be immediately presented, tried and determined.

Further respondent herein consents to the re-
98 lief prayed for by petitioner in his application for an order appointing him conservator of respondent corporation.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,

By A. N. KEMP, President.

ASA V. CALL,

T. RUSSELL HARRIMAN, JR.,

Attorneys for Respondent.

99

Endorsed: Received copy of within appearance this 22nd day of July, 1936. U. S. Webb, attorney general; by John L. Flynn, deputy.

Filed Jul. 22, 1936. L. E. Lampton, county clerk; by M. E. Howard, deputy.

100 [TITLE OF COURT AND CAUSE.]

Order Appointing Conservator and Restraining Order.

It appearing that on the 22nd day of July, 1936, the petitioner in the above entitled proceeding filed herein an application for an order appointing the Insurance Commissioner of the State of California as conservator of respondent corporation and for other relief, and that on
101 said late and pursuant to the appearance and answer of respondent corporation on file herein and its written consent waiving notice of the time and place of hearing on file herein, and evidence, both oral and documentary, having been submitted to the court and the court being fully advised in the premises,

The court finds that petitioner herein, together with a number of other insurance commissioners
102 of states in which respondent corporation transacts its business, made a convention examination of the business and affairs of respondent corporation as of December 31, 1935, and in connection therewith petitioner and said other commissioners have joined in a report of such examination, certified copy of which said report is attached to said application as Exhibit A thereof;

that said examination and report and evidence shows and the court finds the fact to be that respondent corporation is in such condition that its further transaction of business will be hazardous to its policyholders, its creditors and to the public; that said examination and report and evidence further shows and the court finds the fact to be that respondent corporation is insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of the Insurance Code of the State of California; that respondent corporation's said hazardous and insolvent condition is principally caused, among other things, by reason of the fact that respondent corporation has for a considerable number of years last past issued a large number of non-cancellable accident and health policies at a premium rate which was and is now entirely inadequate to maintain the reserves required by law to mature said policy obligations.

Now, therefore, it is hereby ordered, adjudged and decreed that Samuel L. Carpenter, Jr., Insurance Commissioner of the state of California, be and he is hereby appointed conservator of said respondent corporation, its business, assets and affairs, and that said Commissioner be and he is hereby ordered to take possession forth-

106 with of all the books, records, property, real and personal, and assets, wheresoever situated, of said respondent corporation, and to conduct as conservator the business of said respondent corporation for the benefit of the policyholders, creditors and stockholders of respondent corporation and the public in general.

It is further ordered that all the right, title and interest of said respondent corporation in 107 and to all of its assets and property, whether real or personal, wheresoever situated, be and they are hereby vested in petitioner in fee simple; that all persons be and they are hereby enjoined and restrained from in any manner interfering with the possession and title of said petitioner in and to said assets and property, whether real or personal and wheresoever situated; that in the conservation, management and 108 operation of the assets and business of respondent corporation, petitioner deal with its property, assets and business in his own name as Insurance Commissioner of the State of California; that in such connection petitioner appoint and employ such agent or agents, counsel, clerks and assistants as by him may be deemed necessary and fix their compensation.

It is further ordered that the above-named respondent corporation, its officers, directors,

agents, servants and employees be and they hereby are enjoined and restrained from the transaction of any of the business of said corporation or from the disposition of any of its property or assets until the further order of this court.

It is further ordered that the above named respondent corporation, its officers, directors, agents, servants and employees, all creditors of said respondent corporation, all claimants against said respondent corporation and all other persons be and they hereby are enjoined and restrained from interfering with the conservation, management, operation or disposal of any of the assets of or the business of respondent corporation or from instituting or prosecuting any action, suit or proceeding, or from levying any attachment or execution or other process or selling under or prosecuting any attachment or execution or other process against any property or assets of said respondent corporation, wheresoever situated, without the consent of this court obtained after reasonable notice to petitioner.

It is further ordered that all officers, directors, agents, servants and employees of respondent corporation be and they hereby are ordered and directed to deliver to petitioner all books, records, fixtures, equipment, money, bills receivable and

112 other property and assets of said respondent corporation, wheresoever situated.

And it is further ordered that Samuel L. Carpenter, Jr., as conservator of respondent corporation, be and he is hereby authorized and directed to formulate, work out and prepare a rehabilitation and/or reinsurance plan or agreement concerning respondent corporation which shall be subject to the approval of this court and
113 which shall in his judgment fairly and equitably protect and adjust the rights, obligations and liabilities of all persons concerned herein and which shall provide for the removal of the causes and conditions which have made this proceeding necessary; and he is further authorized and directed to pay from the assets of respondent corporation all expenses necessarily incurred.

Done in open court this 22 day of July, 1936.

114

DOUGLAS L. EDMONDS,
Judge of said Superior Court.

Endorsed: Filed Jul. 22, 1936. L. E. Lampton, county clerk; by M. E. Howard, deputy.

Entered Jul. 24, 1936, Docketed Jul. 24, 1936, book 949, page 34, by I. Bottomley, deputy.

115 [TITLE OF COURT AND CAUSE.]

Application for Order to Liquidate.

Comes now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and alleges:

I.

That petitioner is the duly appointed, qualified and acting Insurance Commissioner of the State
116 of California; that on the 22nd day of July, 1936, pursuant to application for order appointing conservator, the above entitled court did, in this proceeding, make and enter its order under and pursuant to Section 1011 of the Insurance Code of the State of California appointing petitioner herein as conservator of said respondent corporation, which said order is hereby referred to and made a part hereof; that thereafter and
117 under and in accordance with the terms of said order your petitioner took possession, title and charge of the business, affairs and assets of respondent corporation, wheresoever situated, and in accordance with the terms of said order petitioner did and is continuing to conserve, manage, operate and conduct the business of respondent corporation.

118 II.

That your petitioner, together with the insurance authorities of several of the other states in which respondent corporation transacted business, caused to be made a convention examination of the business and affairs of respondent corporation as of the 31st day of December, 1935; that said report of examination contains a true and correct statement of the assets, liabilities,
119 business condition and affairs of respondent corporation; that a certified copy of said report of examination was attached, as "Exhibit A," to the above mentioned application for appointment of a conservator.

III.

That respondent corporation is insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of the Insurance Code of the State
120 of California; that by reason of the large deficiency in the reserves required with respect to non-cancellable disability income policies, and for other reasons, it appears to your petitioner that he will be unable to restore the business, affairs and property of respondent corporation to such a position that it would be able to carry on its business as heretofore, maintain its necessary reserves, and discharge in full its obligations to

policyholders and others as they mature, and it further appears to your petitioner that further efforts to proceed under Section 1011 of the Insurance Code of the State of California would be futile and not to the best interests of the policyholders, creditors, stockholders and the public in general and that the interests of such persons would be best served by this court granting a further order providing for and directing the liquidation and winding up of the business of respondent corporation and appointing petitioner as liquidator of said respondent corporation.

IV.

That your petitioner proposes to use his best efforts to conserve the value of the assets of the respondent corporation taken over in liquidation in order that the greatest amount may be obtained and the best protection afforded for the policyholders, claimants and others interested, and to that end to maintain, so far as possible, the preservation of the goodwill and going concern value of the business, represented in large part by its name, its efficient agency organization and other intangible assets of like nature, all of which, if allowed to lapse into inactivity as a result of these proceedings, would fast deteriorate in value and usefulness, resulting in irreparable damage to the policyholders, credi-

tors, stockholders and public in general; that in order to prevent irreparable injury and damage to the agency organization and goodwill value of respondent corporation and to preserve and conserve its assets for the benefit of its policyholders, creditors, stockholders and the public in general, it is imperative that all of the assets of respondent corporation be used by petitioner at the earliest possible date to enable him to work out, formulate and prepare a rehabilitation and/or reinsurance agreement which in the judgment of petitioner will most fairly and equitably preserve the value of the assets and protect the rights, interests, liabilities and claims of all persons concerned herein, including the policyholders, creditors, stockholders and the public in general, and which shall provide for the removal of the causes and conditions which have made this proceeding necessary; that petitioner, as conservator, has heretofore been directed by this court to formulate, work out and prepare a rehabilitation and/or reinsurance agreement, and further directed that when such rehabilitation and/or reinsurance agreement is formulated and prepared that the same be submitted to this court for its approval.

V.

That heretofore and in said order appointing petitioner as conservator, this court made its order enjoining and restraining said respondent corporation, its officers, directors, agents, serv-

ants and employees, from the transaction of any of the business of said corporation or from the disposition of any of its property or assets until the further order of this court; and said persons, all creditors of said respondent corporation and claimants against said respondent corporation, and all other persons, from interfering in the transaction, conservation, management, operation or disposal of any of the assets of or the business of respondent corporation, or from instituting or prosecuting any action, suit or proceeding, or from levying any attachment or execution or other process, or selling under or prosecuting any attachment or execution or other process against any property or assets of said respondent corporation, wheresoever situated, without the consent of this court obtained after reasonable notice to petitioner, and it is necessary and desirable that said order so enjoining and restraining said persons may continue in full force and effect in favor of petitioner as liquidator herein.

VI.

That there are pending various claims of alleged creditors and obligees of respondent; that it is necessary and proper that all creditors and obligees of respondent and all persons having claims against said respondent be given reasonable opportunity to present and file their claims with petitioner after he has been herein appointed liquidator of the business and affairs of

130 respondent; and that petitioner, after his said appointment, have reasonable opportunity to examine into and pass upon the merits of said claims.

Wherefore, petitioner prays for an order of this court:

1. Appointing Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as liquidator of all of the assets and business of The Pacific Mutual Life Insurance
131 Company of California;

2. Confirming all of the right, title and interest heretofore owned by respondent corporation in and to its assets and property, real and personal, wheresoever situated, and heretofore vested in petitioner as conservator, in petitioner or his successor in office as liquidator of The Pacific Mutual Life Insurance Company of California;

132 3. Directing petitioner to conduct, manage and operate the business of respondent corporation in his own name as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and to collect, hold and preserve premiums tendered by any former policyholder of respondent corporation;

4. Directing petitioner, as liquidator, to wind up and liquidate the business of respondent corporation;

133 5. Directing petitioner, as liquidator, forthwith if possible, to formulate, prepare and submit, for the approval of the court, a plan and agreement of rehabilitation and reinsurance which, in the judgment of petitioner, will best preserve the value of the estate in liquidation and provide for the removal of the causes and conditions which have made this proceeding necessary, and most fairly and equitably protect and provide for the rights, interest, liabilities and
134 claims of all persons concerned herein, and directing petitioner to pay from or make provision for the payment from the assets of respondent corporation of all expenses necessarily incurred in connection therewith;

6. Continuing in full force and effect for the benefit of petitioner, as liquidator, all of the injunctions and restraints aforesaid upon any and all persons by said order of this court appointing petitioner as conservator of the busi-
135 ness and assets of respondent corporation;

7. Directing petitioner at an appropriate time to publish notice to the policyholders, creditors, shareholders and all other persons interested in the assets of respondent corporation to file their claims with him as liquidator in his offices located at the Pacific Mutual Building, Los Angeles, California, or at 417 Montgomery street, San Francisco, California, with proper proofs thereof, within six months after the date of first publication of such notice; and

136 8. For such other and further relief as this court may deem meet and proper.

Dated: July 22nd, 1936.

SAMUEL L. CARPENTER, JR.,
Insurance Commissioner of the State of California,
Petitioner.

U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
137 *Deputy Attorney General,*
Attorneys for Petitioner.

State of California, County of Los Angeles—ss.

Samuel L. Carpenter, Jr., being first duly sworn, on oath says:

That he is Insurance Commissioner of the State of California; that he has read the within petition and knows the contents thereof; and that the same is true of his own knowledge except as to the matters and things therein stated
138 on his information or belief, and that as to those matters and things he believes it to be true.

SAMUEL L. CARPENTER, JR.

Subscribed and sworn to before me this 22 day of July, 1936.

[Seal] KATHRYN BUCKMAN,
Notary Public in and for the County of Los Angeles, State of California.

139 In the Superior Court of the State of California, in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No.

MEMORANDUM OF POINTS AND AUTHORITIES.

I.

140 If at any time after the issuance of an order under Section 1011 of the Insurance Code it shall appear to the Insurance Commisisoner that further efforts to proceed under said section would be futile, he may apply to the court for an order to liquidate and wind up the business of the insurance corporation. Upon a full hearing of such application, the court may make an 141 order directing the winding up and liquidation of the business of such insurance corporation by the Insurance Commissioner as liquidator.

Insurance Code, Section 1016;

Insurance Code, Section 1010.

JOHN L. FLYNN.

Endorsed: Filed Jul. 22, 1936. L. E. Lampton, county clerk; by M. E. Howard, deputy.

142 [TITLE OF COURT AND CAUSE.]

Appearance and Answer Re Application for Order Appointing Liquidator.

Comes now the respondent in the above entitled cause and enters its voluntary appearance herein and consents that this cause may be immediately presented, tried and determined.

Further respondent herein consents to the relief prayed for by petitioner in his application
143 for an order appointing him liquidator of respondent corporation.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA,
By A. N. KEMP, President.

ASA V. CALL,
T. RUSSELL HARRIMAN, JR.,
Attorneys for Respondent.

144 Endorsed: Received copy of the within appearance and answer re application for order appointing liquidator this 22nd day of July, 1936. U. S. Webb, attorney general; by .....

Filed Jul. 22, 1936. L. E. Lampton, county clerk; by M. E. Howard, deputy.

145 [TITLE OF COURT AND CAUSE.]

Order of Liquidation.

The above matter having come on to be heard on the application of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California and petitioner herein, for an order to liquidate the business of respondent corporation herein, and it appearing that notice has been duly given thereof to said respondent corporation, and respondent corporation being present in court by its duly authorized attorneys and consenting to the relief prayed for in said application, and oral evidence having been taken, and a full hearing having been had, and good cause appearing therefor,

146

The court finds that petitioner, as conservator herein, will be unable to restore the business, affairs and property of respondent corporation to such a position that it will be able to carry on its business as heretofore, maintain its necessary reserves and discharge in full its obligations to policyholders and others as they mature; that further efforts to proceed under Section 1011 of the Insurance Code of the State of California would be futile and not to the best interests of its policyholders, creditors, stockholders and the

147

148 public generally, and that the interests of such persons would be best served by this court granting a further order providing for and directing the liquidation and winding up of the business of respondent corporation and the appointment of petitioner as liquidator of said respondent corporation;

Now, therefore, it is hereby ordered, adjudged and decreed:

149 1. That Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, is hereby appointed as liquidator of the assets and business of respondent corporation.

2. That all the right, title and interest heretofore owned by respondent corporation in and to its assets and property, real and personal, wheresoever situated, and heretofore vested in petitioner as conservator, is hereby confirmed in 150 petitioner or his successor in office as liquidator of respondent corporation.

3. That petitioner is hereby directed to conduct, manage and operate the business of respondent corporation in his own name as Insurance Commissioner of the State of California, and as liquidator of The Pacific Mutual Life Insurance Company of California, a corporation, and to collect, hold and preserve premiums ten-

151 dered by any form of policyholder of respondent corporation.

4. That petitioner as liquidator is hereby directed to wind up and liquidate the business of respondent corporation.

5. That petitioner as liquidator is directed, forthwith if possible, to formulate, prepare and submit for the approval of this court a plan and agreement of reinsurance and rehabilitation or
152 sale and transfer of assets which in the judgment of petitioner will best preserve the value of the estate in liquidation and provide for the removal of the causes and conditions which have made this proceeding necessary and most fairly and equitably protect and preserve the rights, interests, liabilities and claims of all persons concerned herein; and petitioner is directed to pay from or make provision for the payment
153 from the assets of respondent corporation all expenses necessarily incurred in connection therewith, all as heretofore ordered in the order appointing petitioner conservator of the business of respondent corporation.

6. That those provisions of the order of this court appointing petitioner as conservator which restrain or enjoin any person from doing anything whatsoever be, and they hereby are con-

154 tinued in full force and effect in favor of this petitioner as liquidator.

7. That petitioner shall on or before the 10th day of August, 1936 publish a notice to the policyholders, creditors, shareholders and all other persons interested in the assets of respondent corporation, to file their claims with said petitioner as such liquidator in his offices located in the Pacific Mutual Building, Los Angeles, California, or at 417 Montgomery street, San Fran-
155 cisco, California, with proper proofs thereof, within six months after the date of first publication of such notice. Said notice shall be published in a newspaper of general circulation within Los Angeles County, California, that being the county in which this proceeding is pending, and shall be published not less than once a week for not less than four successive weeks.

Petitioner is further directed to file a copy of said notice, accompanied by affidavit of due pub-
156 lication, including a statement of the date of first publication, with the clerk of this court.

Dated: July 22, 1936.

DOUGLAS L. EDMONDS,
Judge of the Superior Court.

Endorsed: Filed Jul. 22, 1936, 1 p. m. L. E. Lampton, county clerk; by M. E. Howard, deputy.

Entered Jul. 23, 1936; docketed Jul. 23, 1936, book 944, page 160, by I. Bottomley, deputy.

157 [TITLE OF COURT AND CAUSE.]

Petition for Order Permitting, Approving and Authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of the Pacific Mutual Life Insurance Company of California.

Comes now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and alleges:

I.

158 Petitioner is the duly appointed, qualified and acting Commissioner of Insurance of the State of California. That on the 22nd day of July, 1936, pursuant to an application for order appointing a conservator, the above entitled court did in this proceeding make and enter its order under and pursuant to section 1011 of the Insurance Code of the State of California, appointing petitioner herein as conservator of said respondent corporation, which said order is hereby 159 referred to and made a part hereof. That thereafter, pursuant to application for order to liquidate, the above entitled court did in this proceeding make and enter its order under and pursuant to section 1016 of said code, directing the winding up and liquidation of the business of respondent corporation by petitioner as liquidator, which said order is hereby referred to and made a part hereof. That pursuant to said orders, and each of them, your petitioner has

taken possession, title and charge of the business, affairs, property and assets of respondent corporation, wheresoever situated, and is proceeding to administer the same pursuant to the terms of said orders.

II.

By the terms of each of said orders your petitioner was further authorized and directed to formulate, work out and prepare a rehabilitation and/or reinsurance plan or agreement concerning respondent corporation, which, in the judgment of petitioner, would preserve the value of the assets in liquidation and fairly and equitably protect the rights, obligations and liabilities of all persons concerned in the assets, business and affairs of respondent corporation, and to submit the same to this court for its approval. Pursuant to said direction your petitioner has formulated a plan and agreement of rehabilitation, sale and transfer of assets and reinsurance, a copy of which said plan and agreement is hereto attached and made a part hereof as Exhibit A.

III.

In the formulation and preparation of said plan and agreement your petitioner has proceeded upon the theory that the same should:

(1) Preserve the value of the assets of the estate for the benefit of its creditors and policyholders;

163 (2) Protect, as far as possible, all of the existing legal rights of all interested parties in the assets of respondent corporation now in liquidation;

(3) Afford the opportunity to policyholders to maintain, in so far as may be possible, the continuity of their insurance policies;

(4) Enable the established business created by respondent corporation to be protected and maintained as a going concern;

164 (5) Protect the solvency of the corporation in which policies may be reinsured by avoiding the primary cause of the condition of respondent corporation, namely, the writing off of non-cancelable disability and life policies on such a basis that the losses and required reserves cannot be paid or maintained.

IV.

Under said plan and agreement, if the same shall be approved by this court and shall become 165 effective, your petitioner proposes to organize a new California corporation for the purpose of conducting a life and disability insurance business having a capital of $1,000,000, consisting of 10,000 shares of the par value of $100 each, all of one class. Your petitioner will purchase all of the authorized stock of said new company with assets or funds held by him as liquidator of respondent corporation for $3,000,000. Your petitioner will also transfer to said new company

all other assets formerly held by respondent corporation and now held by him as liquidator, excepting the stock of said new company and any and all rights or claims of whatsoever nature which respondent corporation or the liquidator, in his capacity as liquidator of respondent corporation, may have against any of the present or past officers, directors or employees, as such, of respondent corporation, or against any other person, firm or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors or employees of respondent corporation, including rights or claims on any fidelity or surety bond or bonds given to or in favor of respondent corporation to secure the faithful performance by any of its officers, directors or employees of any of their duties as such.

Said plan and agreement provides, in substance, that the new company will assume and reinsure, to the extent and in the manner therein stated, present outstanding policies of insurance and also provides for the assumption and payment by the new company, to the extent and in the manner therein provided, of expenses of administration of this proceeding and of claims of policyholders and others filed and finally allowed in the said proceedings. The plan and agreement makes provision, to the extent and in the manner therein stated, for payments to stockholders of respondent corporation.

169 Your petitioner has considered it impracticable to formulate or attempt to carry into effect a plan of involuntary mutualization in the manner referred to in section 1045 of the Insurance Code, but your petitioner considers it desirable that the new company should operate as soon as possible upon a mutual basis and has therefore included in the above mentioned plan and agreement provisions looking toward the eventual voluntary mutualization of the new company. In this con-
170 nection said plan provides that as soon as legally possible the new company and your petitioner, as the holder of all of its outstanding stock, shall prepare and present to the policyholders of the new company a plan for its voluntary mutualization, and any sums paid by the new company for the acquisition of its outstanding stock pursuant to such mutualization plan, if accepted, and not required for the satisfaction of allowed claims against respondent corporation, shall be
171 repaid by your petitioner, as liquidator, to the new company.

Said plan is to be effectuated by the execution of an agreement between your petitioner as liquidator and said new company, said agreement to be in substantially the form as contained in said Exhibit A hereto attached.

The matter in this paragraph contained is only a brief summary of the terms of said plan and reference is made to said Exhibit A for the complete detailed terms thereof.

172 V.

Your petitioner believes that said plan and agreement of reinsurance and rehabilitation will preserve the value of the assets in liquidation, is fair and equitable to the policyholders, creditors and stockholders of respondent corporation, and that it protects the legal rights of all interested parties as they now exist.

Your petitioner also believes that the provisions for mutualization of the new company
173 will prove attractive to both old and prospective policyholders and will strengthen the financial condition of said new company.

VI.

Petitioner further believes that it is important that said plan should be presently approved by the court and placed in operation forthwith so that there may be no destruction or interruption of the continuity of insurance or of the good will of the present business.

174 Wherefore, your petitioner prays that this court make its order:

1. Approving said plan and agreement of reinsurance and rehabilitation as set forth in Exhibit A as fair and equitable;

2. Authorizing and directing your petitioner forthwith to organize a new corporation and to subscribe to its capital stock by the use of funds and assets under his control as liquidator of

respondent corporation, all in accordance with the terms of said plan and agreement;

3. Authorizing and directing the execution by your petitioner and by said new company upon its organization of an agreement in form substantially as set forth in said plan;

4. Authorizing and directing your petitioner to transfer and set over to said new corporation, upon the execution of said agreement, all of the assets of respondent corporation the title to which is now or may hereafter be vested in him, except the stock of said new company, and also except any and all rights or claims of whatsoever nature which respondent corporation or the liquidator, in his capacity as liquidator of respondent corporation, may have against any of the present or past officers, directors or employees, as such, of respondent corporation, or against any other person, firm or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors or employees of respondent corporation, including rights or claims on any fidelity or surety bond or bonds given to or in favor of respondent corporation to secure the faithful performance by any of its officers, directors or employees of any of their duties as such;

5. Authorizing and directing said new corporation, forthwith upon the execution of said agreement and the transfer of said assets, to

178 commence and carry on the business of an insurance company as permitted by its articles of incorporation and by the laws of the State of California, including the taking over or reinsurance of all policies now constituting obligations of respondent corporation, and including the execution of new policies;

6. Authorizing and directing your petitioner and said new company to do any and all things necessary or proper to carry out the terms of
179 said plan of reinsurance and rehabilitation, either in the State of California or elsewhere;

7. Directing the officers, directors, agents and employees of said respondent corporation to cooperate with and assist your petitioner and said new company in the effectuation of said plan by the execution of such documents of transfer or conveyance or otherwise and the doing of such acts in connection therewith as may be requested of them by your petitioner.

180 Dated: July 22nd, 1936.

SAMUEL L. CARPENTER, JR.,
Insurance Commissioner of the State of California,
Petitioner.

U. S. WEBB,
Attorney General,

By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Petitioner.

181 State of California, county of Los Angeles—ss.

Samuel L. Carpenter, Jr., being first duly sworn, on oath says:

That he is the Insurance Commissioner of the State of California; that he has read the within petition and knows the contents thereof; and that the same is true of his own knowledge except as to the matters and things therein stated on his information or belief, and that as to those matters and things he believes it to be true.

182 SAMUEL L. CARPENTER, JR.

Subscribed and sworn to before me this 22 day of July, 1936.

(Seal) KATHRYN BUCKMAN,
Notary Public in and for the County of Los Angeles, State of California.

In the Superior Court of the State of California in and for the County of Los Angeles.

183 Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No.

MEMORANDUM OF POINTS AND AUTHORITIES.

I.

The Insurance Commissioner as conservator or as liquidator may, subject to the approval of the court, reinsure the business of any insurance

company in any proceeding under article 14 of chapter 1 of part 2 of the Insurance Code, or enter into rehabilitation agreements. The Insurance Commissioner has authority, in accordance with such terms as the court may prescribe, to sell, transfer or otherwise dispose of any real or personal property of any such insurance company.

Section 1043, Insurance Code;

Section 1037(d), Insurance Code.

II.

Rehabilitation and reinsurance agreements of insurance companies have been uniformly approved by the courts.

People ex rel. Van Schaick (National Surety Company), 268 N. Y. S. 88, affirmed 264 N. Y. 473, 191 N. E. 521;

Matter of People ex rel. Van Schaick (Title & Mortgage Guarantee Co. of Buffalo), 264 N. Y. 69, 190 N. E. 153;

Lester v. Wright (Ga.), 93 S. E. 408;

Royal Union Life Ins. Co. v. Gross (C. C. A. 8), 76 Fed. (2d) 219; certiorari denied, 55 S. Ct. Rep. 834;

Casteel v. Kentucky Home Life Ins. Co. (Ky.), 79 S. W. (2d) 941.

JOHN L. FLYNN.

187 EXHIBIT A.

Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Concerning The Pacific Mutual Life Insurance Company of California

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Proposed July 22, 1936

By Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California

188 REHABILITATION, SALE AND TRANSFER OF ASSETS AND REINSURANCE PLAN AND AGREEMENT CONCERNING THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

PRELIMINARY STATEMENT

1. History of Company and Necessity for Plan.

The Pacific Mutual Life Insurance Company of California was organized under the laws of the state of California in 1867. Its principal
189 office is located in Los Angeles, California, and since its organization it has engaged principally in the business of life insurance and also in the business of accident and health insurance, and it has been carrying on its business in more than forty of the forty-eight states of the United States and has reached a position of major importance. It is authorized to write, and for many years has written life insurance policies on a participating basis as well as life, accident

and health insurance policies on a nonparticipating basis. According to its last balance sheet as of December 31, 1935 it has total admitted assets of $215,561,220.32. Its premium income for the past three years has averaged $30,393,211.95 per year. Its policyholders exceed 250,000 in number and it has issued and outstanding (including treasury shares) 508,200 shares of its capital stock held by more than 2800 persons. The total life insurance written by it and in force prior to the court proceedings hereinafter mentioned, was approximately $636,454,000.

In 1918 it commenced writing a new type of policy, viz., a noncancelable disability income policy, which proved to be attractive to the public. Due to the fact that there was little or no actuarial experience on this type of policy at that time, the premium rate established was too low and the reserves established thereon have proved to be inadequate. At the present time and for the past three years the Company has been paying, on the average, approximately $4,108,000 per year by way of disability benefits on these policies, resulting in substantial annual losses on this class of business. On the basis of past experience with this type of policy, the probable future disability claims on outstanding policies would be so substantial as to make the continuation of the Company's business on its present basis hazardous to all policyholders.

193 As a result of the recent tri-annual Convention Examination of the affairs of the Company, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, with the approval of the Insurance Commissioners of other states who participated in the Examination, determined to take the proceedings hereinafter mentioned to preserve the assets of the Company and, so far as possible, its agency organization, good will and going business value for the benefit of
194 its policyholders and all other persons interested therein.

2. Court Proceedings.

On July 22, 1936, the Insurance Commissioner, acting pursuant to the California Insurance Code, filed an application with the Superior Court of the State of California in and for the County of Los Angeles, alleging the Company to be in such condition that its further transaction of business would be hazardous to its policy-
195 holders, creditors and the public, and that it was insolvent, and requesting an order vesting title to all of the assets of the Company in the Commissioner in his official capacity and directing the Commissioner to take possession of all of its books, records and properties and to conduct, as conservator, the business of the Company and enjoining the Company from the transaction of its business or the disposition of its property until a further order of court. On the same day

196 an order of court was made and entered granting the application and appointing the Commissioner conservator.

Thereafter, upon further application of the Commissioner, an order of liquidation was made, appointing him liquidator of the Company. In its order the court directed the Commissioner to formulate a plan and agreement of reinsurance and rehabilitation or sale and transfer of assets, which in the judgment of the Commissioner will
197 best preserve the value of the estate in liquidation and provide for the removal of the causes and conditions which made the proceeding necessary and most fairly and equitably protect and preserve the rights, interests, liabilities and claims of all persons concerned. Thereafter, the Commissioner presented to the court and the court approved the following plan and agreement.

PLAN

198 1. Organization of New Company.

The Commissioner, as liquidator, and as such vested with title to all of the properties and assets of the Company, will organize a new corporation (hereinafter referred to as the "New Company") under the laws of California for the purpose of conducting a life and accident and health insurance business. The New Company will have an authorized capital of $1,000,000 consisting of 10,000 shares of the par value of $100 per share, all of one class. Although a

stock company, it will be authorized to issue participating policies on a legal reserve basis. The directors of the New Company will be selected and approved by the Commissioner. The Commissioner will subscribe for and purchase with assets or funds held by him as liquidator of the Old Company all of the authorized stock of the New Company for $3,000,000, which will thus establish the New Company with a paid-in capital of $1,000,000 and a paid-in surplus of $2,000,000. The stock of the New Company thus issued to the Commissioner as liquidator of the Old Company will be held by the Commissioner, subject to the ultimate mutualization of the New Company, as hereinafter provided.

2. Transfer of Assets to New Company.

All of the properties and assets formerly owned by the Old Company and held by the Commissioner as its liquidator will be transferred and conveyed to the New Company, with the exception of the stock of the New Company and certain claims reserved to the Commissioner as liquidator in the agreement hereinafter set forth.

3. Treatment of Policyholders.

Under the plan and agreement the policyholders of the Old Company will be given the following rights:

(a) All policyholders (other than holders of any form of noncancelable income policies hereinafter referred to as "non-can policies") will be

entitled either (1) to accept the assumption and reinsurance by the New Company of their existing policies or (2) to file a claim with the Commissioner as liquidator of the Old Company;

(b) The holders of non-can policies will be entitled either (1) to file a claim with the Commissioner as liquidator of the Old Company, or (2) to accept the assumption and reinsurance by the New Company of their existing policies on the reduced basis provided in the agreement hereinafter set forth.

4. Assumption by New Company of Expenses, Allowed Claims and Policy Claims.

The New Company will assume and agree to pay the following:

(a) All expenses of the administration of the Commissioner as conservator and liquidator of the Old Company, including such attorneys' fees as may be fixed by the Attorney General of the State of California and approved by the court in the conservation and liquidation proceeding;

(b) Unpaid taxes, wages, salaries and current operating bills of the Old Company;

(c) All claims filed with the Commissioner as liquidator of the Old Company and finally allowed by the Commissioner and/or by the court;

(d) All policy claims of whatever character (except claims on non-can policies), whether filed, or whether notice of which was filed, prior or subsequent to the order of liquidation; subject,

however, to any and all defenses thereto which would have been available to the Old Company;

on

(e) Only such claims ~~or~~ non-can policies, as were filed, or notice of which was filed with the Old Company prior to the order of liquidation; subject, however, to any and all defenses thereto which would have been available to the Old Company;

Provided, however, that the obligation of the New Company with respect to items (a), (b) and (c) shall be limited to the value of the properties and assets of the Old Company transferred to the New Company pursuant to the agreement hereinafter set forth less the reserves established by the New Company with respect to policies and policy claims of the Old Company assumed and/or reinsured by the New Company.

5. Agents' Contracts.

The New Company will assume all outstanding agents' contracts executed by the Old Company; provided, however, (a) no commissions due after the order of liquidation shall be paid on non-can policies on all forms issued prior to, and including, Forms A 291 to A 294, both inclusive, and commissions due after said order on all non-can policies issued on all other forms, the holders of which accept their reinsurance and assumption by the New Company on the reduced basis hereinafter provided in the agreement, shall be reduced

in proportion to the reduction in disability benefits to the insured under such policies; and (b) the New Company shall not assume or be bound by any arrangement which the Old Company may have made with its agents regarding payment of commissions on policies after lapsation.

6. Treatment of Stockholders of Old Company.

The stockholders of the Old Company shall be entitled to receive pro rata for a period of ten years commencing with the effective date of the agreement hereinafter set forth, the net earnings of the New Company derived from that portion of the business of its nonparticipating life, accident and health departments represented by policies of the Old Company assumed and reinsured by the New Company, remaining after the holders of non-can policies, who shall have elected to accept the assumption and reinsurance of their policies by the New Company on the reduced basis hereinafter provided in the agreement, shall have been restored to the benefits originally provided in their policies and certain depreciation reserves and additions to surplus shall have been established and made as hereinafter provided in the agreement, and after all finally allowed claims filed with the Commissioner as liquidator shall have been paid.

At the end of said ten-year period, the New Company is to create a fund amounting to ten

211 dollars per one thousand dollars of nonparticipating life insurance assumed and reinsured by the New Company, to which fund the stockholders of the Old Company shall be entitled pro rata, after restoration to non-can policyholders, establishment of reserves and surplus, and payment in full of allowed claims filed with the Commissioner as liquidator, as aforesaid. The New Company may at its option postpone the creation of said fund, but in such event the New Company shall
212 pay an amount equal to interest on said fund at the rate of six per cent per annum until the principal of said fund shall be created, and such interest payments shall be distributed to the stockholders of the Old Company after the fulfillment of the conditions above referred to.

7. Mutualization of New Company.

As soon as legally possible, the New Company and the Commissioner, as the holder of all of the outstanding stock of the New Company, shall
213 prepare and present to the policyholders of the New Company a plan for its voluntary mutualization in accordance with the laws of the State of California, as then in effect. Such mutualization plan shall contain such terms and provisions not inconsistent with this plan and agreement, as may be required by law or approved by the Commissioner and the New Company. The purchase price paid by the New Company for the acquisition of its outstanding stock pursuant to

such mutualization plan to the extent not required for the satisfaction of items ~~(a) and (b)~~ (c) of paragraph 4 above shall be repaid to the New Company.

AGREEMENT

The plan shall be consummated through the execution of the following agreement between the Insurance Commissioner of the State of California, as liquidator of the Old Company, as one party, and the New Company as the other party, and as to any inconsistency between the plan and the following agreement, the latter shall control:

REHABILITATION, SALE AND TRANSFER OF ASSETS AND REINSURANCE AGREEMENT.

This Agreement, made and entered into this ..... day of ....., 1936, between Pacific Mutual Life Insurance Company, a California corporation, and Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, a California corporation,

Witnesseth:

Whereas, an order was entered in the Superior Court of the State of California in and for the County of Los Angeles on the 22nd day of July, 1936, in a proceeding entitled "Samuel L. Carpenter, Jr., Insurance Commissioner of the State

of California, Petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, Respondent," by which the court found that The Pacific Mutual Life Insurance Company of California was in such condition that its further transaction of business would be hazardous to its policyholders, creditors and to the public, and that said Company was insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1, of the Insurance Code of the State of California, and by which said order title to all of the assets of said Company, wheresoever situated, was vested in Samuel L. Carpenter, Jr. in his official capacity as Insurance Commissioner of the State of California, and by which order said Commissioner was directed forthwith to take possession of all of the books, records, property, real and personal, and assets of said Company and to conduct as conservator the business of said Company, and enjoining said Company and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until the further order of said court, and pursuant to said order said Commissioner has become vested with the title to and did take possession of all of the books, records, property, real and personal, and assets of said Company; and

Whereas, said Commissioner as conservator as aforesaid, did thereafter apply to said court for

220 an order for the liquidation of said Company and for an order directing the Commissioner to formulate and submit a plan and agreement of rehabilitation and reinsurance which, in the judgment of the Commissioner, would best preserve the value of the estate in liquidation, provide for the removal of the cause which made the proceeding necessary, and most fairly and equitably protect the rights and claims of all persons interested therein; and

221 Whereas, said court thereafter made and entered an order for the liquidation of said Company, appointing the Commissioner as liquidator thereof, and as such vested with title to all of the assets of said Company, and directing the Commissioner to file such a plan; and

Whereas, said Commissioner submitted to said court a Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement, of which this agreement is a part, alleging that said

222 plan and agreement will preserve the value of the assets in liquidation, is fair and equitable to the policyholders, creditors and stockholders of said Company, and protects the legal rights of all interested parties as they now exist; and

Whereas, thereafter said court made and entered an order approving said plan and agreement, and finding that said plan and agreement is fair and equitable and protects the existing legal rights of the policyholders, creditors and

223 stockholders of said Company, and directing that the Commissioner proceed to consummate said plan and execute this agreement;

Now, Therefore, in consideration of the premises and of the respective undertakings of the parties hereto, It Is Hereby Agreed:

Definitions

1. The parties to this agreement and the persons mentioned herein will be referred to and certain terms used herein are hereby defined as
224 follows:

Samuel L. Carpenter, Jr., in his capacity as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and any successor Commissioner and liquidator, will be referred to as "Commissioner."

The Pacific Mutual Life Insurance Company of California will be referred to as the "Old
225 Company."

Pacific Mutual Life Insurance Company will be referred to as the "New Company."

The Superior Court of the State of California in and for the County of Los Angeles will be referred to as the "Court."

The date and hour of entry of said order of liquidation, to wit, July 22, 1936, at ..... o'clock .... M. Pacific Standard Time, will be referred to as the "date of liquidation."

This agreement shall be deemed to have been executed and shall be effective as of the date and hour of entry of said order of liquidation, and said date and hour will be referred to as the "effective date of this agreement."

The phrase "assets of the Old Company" or any similar phrase used in this agreement shall be deemed to mean all books, records, property, real and personal, tangible and intangible, and all other assets of every kind, character and description whatsoever, and wheresoever situated, owned by the Old Company at the time of the appointment of the Commissioner as conservator which shall not have been applied by him against his subscription for stock of the New Company or disposed of by him in the due course of his administration as conservator or in his administration as liquidator of the Old Company, plus all property acquired by the Commissioner in either of said capacities and the income therefrom collected by him, except (a) the stock of the New Company held by him, and (b) any and all rights or claims of whatsoever nature which the Old Company or the Commissioner, in his capacity as liquidator of the Old Company, may have against any of the present or past officers, directors or employees, as such, of the Old Company, or against any other person, firm or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers,

229 directors or employees of the Old Company, including rights or claims on any fidelity or surety bond or bonds given to or in favor of the Old Company to secure the faithful performance by any of its officers, directors or employees of any of their duties as such.

Outstanding policies of the Old Company known as its Non-Cancelable Income Policies, including the Aggregate form thereof, will be referred to as "Non-Can Policies."

230

Transfer of Assets

2. The Commissioner shall grant, bargain, sell, assign, convey, transfer, set over and deliver to the New Company the assets of the Old Company.

The Commissioner shall not be required to make manual delivery of any cash or securities deposited by the Old Company with any governmental authority as a condition to the conduct of
231 its business, but shall only be required to assign his interest therein, subject to the terms of such deposit.

The Commissioner shall transfer and deliver to the New Company the full amount of all premiums paid to the Commissioner on any policy reinsured and assumed hereunder which have been paid in to the Commissioner on or after the date of liquidation, and the New Company shall credit the holder of such policy with the payment of

such premiums accordingly, subject to repayment as hereinafter provided in the event the holder of such policy shall elect not to accept such reinsurance and assumption by the New Company. The New Company shall repay to the Commissioner upon demand any premium received by the New Company hereunder from the Commissioner which was paid by or on behalf of the insured after the date of liquidation to the Commissioner, if the policyholder has filed or shall file a claim in accordance with the Commissioner's notice requiring the filing of claims in the above mentioned cause, and the court shall direct the Commissioner to return the premium so paid.

Subsequent to the effective date of this agreement and for such period of time as the Commissioner may determine, no investment or reinvestment of the assets of the Old Company transferred to the New Company pursuant to this agreement shall be made without first obtaining the written approval of the Commissioner. The Commissioner hereby agrees that said period shall in no event exceed six months from and after the effective date of this agreement.

Reinsurance and Assumption of Policies Other Than Non-Can Policies

3. The New Company does hereby reinsure and assume, as of the date of liquidation, with the exception hereinafter provided, the liability of the Old Company under all life, endowment an-

235 nuity and term policies and contracts of insurance, and all other policies and contracts of insurance, including, without limiting the same to, health and accident benefits, waiver of premium disability benefits, permanent and total disability benefits, and all supplementary contracts, annuity contracts and all reinsurance contracts, issued or assumed by the Old Company and outstanding and in force on the books and records of the Old Company at the date of liquidation, subject, how-
236 ever, to any and all defenses, offsets, counterclaims, cross-complaints and rescission rights against said policies or contracts or against any claims and actions thereon, which would have been available to the Old Company had this agreement not been made; provided, however, that all outstanding Non-Can Policies are not reinsured or assumed under this paragraph and are hereby expressly excepted from the obligations of the New Company under this paragraph. The de-
237 termination by the New Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so reinsured hereunder.

Reinstatement of Lapsed Policies

4. The New Company will reinstate any policies heretofore issued, assumed or reinsured by the Old Company, which are not excepted from the obligations of the New Company contained

in the foregoing paragraph and which at the date of liquidation, by their terms, were entitled to reinstatement, provided that all requirements necessary to procure a reinstatement of said policies under their terms are fulfilled to the satisfaction of the New Company.

The New Company will also reinstate, during the lifetime of the insured and provided the insured is not in such condition as to be eligible for benefits under the policy, without evidence of insurability, any of said policies, with the aforesaid exception, which have lapsed since the date of liquidation, upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made and premiums are paid within sixty (60) days after the effective date of this agreement. Upon the reinstatement of such lapsed policy it shall, for all purposes, be treated the same as if it had been in force on the date of liquidation and be subject to the terms and conditions of this agreement.

Payment of Policy Claims Other Than Claims on Non-Can Policies

5. The New Company will pay in full, in accordance with the terms and conditions of the policies or other contracts under which the claims shall have been or may be made, and whether or not the claims arose or matured prior or subsequent to the date of liquidation, all claims (except claims on Non-Can Policies) including, without

limiting the same to, claims for death benefits, matured endowments, annuity payments, permanent total disability and premium waiver benefits, accident and sickness benefits, payments under policy settlement agreements, policy dividends left at interest with the Old Company prior to the date of liquidation, and payments under all other matured contracts under which the proceeds of policies and contracts were left with the Old Company prior to the date of liquidation; subject, however, to any and all defenses, offsets, counterclaims, cross-complaints and rescission rights against any such claim or claims which would have been available to the Old Company had this agreement not been made.

Reinsurance and Assumption of Non-Can Policies

6. The New Company does hereby reinsure and assume, as of the date of liquidation, the liability of the Old Company under all Non-Can Policies issued by the Old Company and outstanding and in force on the books and records of the Old Company at the date of liquidation, subject, however, to the terms, conditions and limitations, and only to the extent hereinafter specifically provided and subject, further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against such policies or any claims and actions thereon which would have been available to the Old Company had this agreement not been made. The determination by the New

244 Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so reinsured hereunder.

Terms, Conditions, Limitations and Extent of Reinsurance and Assumption of Non-Can Policies

7. The obligation of the New Company with respect to the payment of monthly disability benefits on claims either filed or notice of which
245 is filed with the New Company or any of its predecessors at any time after the date of liquidation under Non-Can Policies reinsured and assumed under the preceding paragraph, subject to restoration as provided in paragraph 8 hereof, shall be limited to payment of the following percentages of the monthly disability benefits originally provided under said policies, according to the following premium classes, respectively:

246

Premium Class of Policy	Percentage of Original Monthly Benefit Assumed By New Company
1918 Premium class Issued under Rate Books: A 1445, A 1445 Z, A 1445 Y, A 1445 X and A 1445 W. in period from: August, 1918—September, 1921	20%
1921 Premium class Issued under Rate Books: A 1687, A 1687 Z, A 1687 Y, A 1687 X, A 1687 W.	35%

247 in period from:
September, 1921—July, 1926.

1926 Premium class
Issued under Rate Books:
A 1958, A 1958 Z, A 1958 Y, 45%
in period from:
July, 1926—February, 1929.

1929 Premium class
Issued under Rate Books:
A 2293 55%
248 in period from:
February, 1929—January, 1931.

1931 Premium class
Issued under Rate Book:
A 2367 65%
in period from:
January, 1931—March, 1932.

1932 Premium class
Issued under Rate Books:
A 2432, A 2432 Z, A 2499 90%
in period from:
249 March, 1932—February, 1935.

Aggregate policy
Issued under Rate Books:
A 2499, A 2567 90%
in period from:
October, 1933—July, 1935.

Note: All of the above mentioned Rate Books are Rate Books issued by the Old Company and copies are on file at the office of the New Company at 523 West Sixth Street, Los Angeles,

California, and in the offices of the Insurance Commissioners or similar public officials of each state in which the Old Company has been transacting insurance business.

Notwithstanding the foregoing limitation on the obligation of the New Company to make monthly disability payments on such policies, there shall be no change or reduction in the original premium rates on such policies, and to be entitled to the reinsurance and assumption of his Non-Can Policy by the New Company as aforesaid, the policyholder shall be obligated to continue to make premium payments at the rate originally provided in his policy.

Restoration of Non-Can Benefits

8. The New Company shall be obligated to restore the monthly disability benefits originally provided in the Non-Can Policies reinsured and assumed under this agreement by applying and only by applying, to such extent and in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance Commissioner of the State of California as hereinafter provided, sums equivalent to the following:

(a) The net profits derived by the New Company from that portion of the business of its accident and health department represented by accident and health policies reinsured and as-

sumed under this agreement, including all Non-Can Policies so reinsured and assumed hereunder; and

(b) The net profits derived by the New Company from that portion of the business of the nonparticipating branch of its life department represented by nonparticipating life insurance policies reinsured and assumed hereunder.

As of December 31, 1938, and tri-annually thereafter or at the time of the regular examination of the New Company by the Insurance Commissioner of the State of California, the New Company shall render to such Commissioner an accounting of the net profits, if any, arising from the sources referred to in (a) and (b) above, including the New Company's proposal as to the extent and manner of the application of sums equivalent to such net profits to the restoration of benefits on said Non-Can Policies. Any such proposal may include provision for proportionate restoration of commissions to agents, who through accepting the assumption of their contracts on the basis hereinafter provided, have received less commissions on such policies than they otherwise would have received. After the approval of any such proposal by said Commissioner with such changes as he may require therein, the New Company shall proceed to put said proposal into effect. The extent and manner of the restoration, as provided in any such pro-

posal so approved by said Commissioner, shall be binding upon all holders of said Non-Can Policies and other persons interested therein.

The holders of any such Non-Can Policies surrendered to the New Company in connection with any settlement thereunder, shall not be entitled thereafter to any of the benefits of such restoration.

The holders of any such Non-Can Policies which shall have lapsed after the date of liquidation and which shall not have been reinstated either in accordance with their terms or in accordance with the provisions of this agreement, shall not be entitled thereafter to any of the benefits of such restoration.

Reinstatement of Lapsed Non-Can Policies

9. The provisions of paragraph 4 of this agreement with respect to reinstatement of lapsed policies shall apply to Non-Can Policies, subject to the terms, conditions and limitations contained in paragraphs 6 and 7 hereof.

Payment of Claims on Non-Can Policies Filed Prior to Date of Liquidation

10. The New Company shall be obligated to continue the payment of all disability benefits under Non-Can Policies, claims or notices of claims for which had been filed with the Old Company prior to the date of liquidation, and all payments under settlement agreements made

by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to any such settlement agreements; and subject, further, to any and all defenses, offsets, counter-claims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company had this agreement not been made.

Moratorium

11. The reinsurance and assumption of obligations by the New Company herein provided for are subject to the condition that the new Company shall not be required, prior to sixty (60) days, and such additional period as may be determined by the Commissioner, from and after the effective date of this agreement, to make policy loans (except for the purpose of paying premiums on the same policy or on additional policies issued on the same life), or to pay cash surrender values. This provision, however, shall not apply to any increase in values that are accumulated from premium payments or loan repayments which are received subsequent to the date of liquidation.

During such period as the moratorium is in effect the cash surrender option of all policies of the Old Company may be considered as non-existing, except as provided above, and all pol-

icyholders who do not pay their premiums and who are entitled to a guaranteed value will be restricted to the automatic nonforfeiture value (properly adjusted for any policy indebtedness and accrued interest thereon) under the policy. At the discretion of the New Company, however, the cash surrender value under any policy, properly adjusted for any policy indebtedness and accrued interest thereon, may be allowed whenever it appears, in the sole judgment of the New Company, that the granting of such surrender value will be to the advantage and benefit of the Old Company policyholders as a class.

Assumption of Claims Against Old Company

12. The New Company hereby assumes and agrees to pay the following:

(a) All costs and expenses of the Commissioner in his capacities as conservator or liquidator of the Old Company, including attorneys' fees, as finally approved by the court;

(b) All unpaid taxes legally due the United States, the State of California, and other States, and Counties and Municipalities thereof, in connection with the business and assets of the Old Company, and remaining unpaid.

(c) Wages and sala ies legally due to persons employed by the)ld Company for services rendered and curre t bills for office supplies and incidental expense in connection with the

operation of the business of the Old Company and remaining unpaid.

(d) All claims against the Old Company filed with the Commissioner as liquidator, and finally allowed by the Commissioner and/or by the court.

The obligation of the New Company with respect to items (a), (b), (c) and (d) above shall be to pay the same, in the order of preference established by law, and shall be limited, in the aggregate, to an amount equal to the value of the assets of the Old Company transferred to the New Company pursuant to this agrement, on the basis of valuation provided in paragraph 13 of this agreement, less the amount of the reserves established by the New Company, with the approval or in accordance with the requirements of the Commissioner, with respect to policies of the Old Company reinsured and assumed by the New Company hereunder, and with respect to policy claims assumed by the New Company hereunder.

Valuation of Assets Transferred to New Company

13. The assets of the Old Company transferred to the New Company pursuant to this agreement shall be valued at the amounts established therefor in the so-called "Convention Report" made in 1936 by the Commissioner and similar officials of certain other states in which

the Old Company did business, with respect to the condition of the Old Company, as of December 31, 1935.

Agents

14. The New Company hereby assumes, subject to the limitation and exception hereinafter stated, any obligations under any contract heretofore made by the Old Company with any agent (regardless of classification), manager, or supervisor, it being recognized that the services of the agents who produced, or under his direction or supervision was produced, the business reinsured or assumed hereunder in servicing said business, and the maintaining of same in force as to the ultimate interest and advantage of the policyholders of the Old Company. However, the obligations of the Old Company to pay commissions on Non-Can Policies reinsured and assumed by the New Company, with the limitations as to disability benefits hereinbefore provided, shall be reduced as follows: (a) No commissions due after the date of liquidation shall be paid on Non-Can Policies on all forms issued prior to and including Forms A291 to A294, both inclusive, and commissions due after the date of liquidation on all Non-Can Policies issued on all other forms, and the holders of which accept and reinsure their assumption by the New Company on the reduced basis hereinbefore provided, shall be reduced in proportion to the re-

271 duction in disability benefits to the insured under such policies. The New Company shall not assume or be bound by any agreement which the Old Company may have made with agents with respect to payment of commissions on policies after lapsation. To such extent, in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance Commissioner of the State of California, as provided in paragraph 8 of this agreement,
272 the New Company shall apply its net profits derived from the sources referred to in (a) and (b) of said paragraph 8 to the restoration to agents of the amounts of the reduction in their commissions on policies referred to in (b) of this paragraph to which said agents would have otherwise been entitled.

Additional Payments on Allowed Claims and Payments to Stockholders of Old Company

273 15. For a period of ten (10) years commencing January 1, 1937, the New Company shall pay to the Commissioner for the benefit of holders of claims filed with the Commissioner and finally allowed by him or by the court, until such claims shall have been paid in full, and thereafter for the benefit of and distribution to the stockholders of the Old Company, the net profits of the New Company derived from the sources referred to in (a) and (b) of paragraph 8 of this agreement remaining after:

(a) The holders of Non-Can Policies referred to in said paragraph 8 shall have been restored to the full benefits originally stated in their policies as provided in said paragraph; and

(b) The New Company shall have established such reserves as may be deemed necessary by the New Company and the Commissioner for proper depreciation of the assets allocated to, or held by, the New Company for the benefit of the departments referred to in (a) and (b) of said paragraph 8; and

(c) Restoring to surplus allocated to the participating life department of the New Company the sum of $1,792,118.97, or its equivalent, together with interest thereon to date of restoration at the average rate earned by the New Company during such period on its invested assets; and

(d) Creating a reserve or adding to the surplus of the New Company an amount equal to the amount of policy reserve for Non-Can Policies released by reason of lapsation of such policies reinsured and assumed hereunder in excess of a lapse rate of ten per cent (10%) per year, or occasioned by substitutions or exchanges of such policies for other types of accident or health insurance.

At the end of said ten (10) year period, to wit, on January 1, 1947, the New Company shall create a fund equal to $10 per $1000 of nonpartici-

277 pating life insurance reinsured and assumed by the New Company under this agreement and then remaining in force, which fund shall be applied, first, to the extent necessary to complete the restoration of holders of Non-Can Policies reinsured and assumed by the New Company hereunder to the benefits originally provided in their policies in such manner and to such extent as may be approved by the Commissioner and subject to the other limitations prescribed in
278 paragraph 8 of this agreement, and, second, to the Commissioner for the benefit of claims filed with the Commissioner and finally allowed, and thereafter for the benefit of and distribution to the stockholders of the Old Company.

In lieu of creating said fund on January 1, 1947, as aforesaid, the New Company may at its option, apply to the aforesaid purposes a sum equal to interest at the rate of six per cent (6%) per annum on an amount equal to said
279 fund computed as aforesaid, until such time as the New Company may elect to create the principal of said fund and apply the same as aforesaid. If the New Company shall elect on January 1, 1947 to pay and apply a sum equal to interest on said fund as aforesaid, then such payment shall be applied in the same manner as, and shall be deemed to be in lieu of the application of the Old Company's net profits as provided in paragraph 8 of this agreement and the Old Company's obligations with respect to appli-

cation of said net profits as provided under said paragraph 8 shall terminate.

Any such payments to stockholders of the Old Company, in accordance with the foregoing, shall either be made pro rata to such stockholders, as their interests may appear according to the stock ledgers of the Old Company, or the New Company may issue to the Commissioner or to such stockholders appropriate certificates of the New Company evidencing its obligation to make such payments. Such certificates of interest may either be issued by the New Company to the Commissioner for distribution by him to stockholders of the Old Company in exchange for their stock certificates, or, at the election of the New Company, may be issued by the New Company directly to such stockholders upon the surrender of their stock certificates.

Mutualization of New Company

16. The New Company hereby consents to such plan for its voluntary mutualization in accordance with the laws of the State of California as now in effect, or hereafter amended, as may be proposed by the Commissioner, as soon as legally possible; and the Commissioner agrees to propose such mutualization plan, as the holder of the stock of the New Company. Such mutualization plan shall contain such terms and provisions, not inconsistent with this agreement, as may be required by law or approved by the

283 Commisioner and the New Company. The purchase price paid by the New Company for the acquisition of its outstanding stock pursuant to such mutualization plan to the extent not required by the Commissioner as the holder of said stock for the satisfaction of claims against the Old Company, filed with the Commissioner and finally allowed, shall be repaid by the Commissioner to the New Company.

Notice

284 17. The New Company shall mail promptly to the insured named in all policies and supplementary contracts of the Old Company in force at the date of liquidation, and any assignees thereof of record, a printed copy of the Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan concerning the Old Company, including a copy of this agreement as executed, to which the New Company may attach its certificate of reinsurance and assumption, inserted
285 in an envelope, first class postage prepaid, addressed to the name and address of each of the persons aforesaid last shown upon the records of the Old Company. By "assignees of record" is meant assignees appearing upon the records of the Old Company at its Home Office.

Election of Policyholders and Claimants and Effect Thereof

18. Each policyholder and policy claimant of the Old Company may elect either to accept the

reinsurance and assumption of his policy or contract and/or any claim thereunder by the New Company, as provided in this agreement, or to file his claim against the Old Company with the Commissioner, in the manner provided by the Insurance Code of the State of California with respect to the filing of claims against an insurer in the process of liquidation. Persons so filing claims, who shall not withdraw them as hereinafter provided, are herein referred to as dissenting policyholders. The filing of a claim by any dissenting policyholder shall remove the policy or contract in respect of which said claim shall be filed, and the claim of persons under such policy or contract from the benefit of the provisions of this agreement with respect to reinsurance and/or assumption, and shall constitute an irrevocable election, on the part of such policy or contract holder, and his beneficiary and all persons claiming under him, not to accept the benefit of such reinsurance and/or assumption provisions unless such claim shall be withdrawn by the claimant at any time prior to the expiration of sixty (60) days from and after the date of the expiration of the time for filing claims, as provided by law, with the written consent of the New Company, in which event such policy or contract, and the persons interested in the benefits thereunder, shall be entitled to the benefit of such reinsurance and/or assumption provisions and shall be bound by this agreement.

289 Every person entitled to accept any benefit under this agreement, who shall have indicated his election so to do either by not filing any such claim, or by withdrawing such claim if filed, shall be considered as assigning to the New Company all his claims against the Old Company, and the benefits of any rights, securities, liens, or preferences to which he may be entitled by reason of his claims and also as so assigning all interest to which his claims may entitle him in all of the 290 assets of the Old Company, whether located in California or elsewhere. The New Company shall be entitled to assert and prosecute its claims, securities, liens or preferences of all holders of policies or contracts, issued or assumed by the Old Company, who so assent to or become bound by the provisions of this agreement, and the New Company shall be entitled to assert and obtain in such manner as it may deem best, any rights, securities, liens, or preferences to which the hold- 291 ers of policies or contracts issued or assumed by the Old Company, who shall so assent to or become bound by the provisions of this agreement, would have had.

Each holder of any policy or contract issued or assumed by the Old Company, who shall not have filed his claim against the Old Company with the Commissioner in the manner and within the period required by law, shall be deemed ipso facto to have assented to and become bound by

292 the provisions of this agreement, and entitled to the benefits hereof, subject to all of its terms. No holder of any such policy or contract of the Old Company who shall be deemed to have assented to or become bound by the provisions of this agreement shall have any rights, securities, liens, or preferences not accorded by this agreement.

Right of the New Company to Prosecute and Defend Claims

293 19. All claims or demands against the Old Company or its property now the subject of litigation in any court of competent jurisdiction in actions against the Old Company, and any and all claims and demands against the Old Company or its property filed with the Commissioner as liquidator, may be prosecuted and defended until final judgment, and the New Company shall have the right to assist and join in such defense through counsel selected and paid by the New 294 Company, and with all defenses, offsets, counterclaims, cross-complaints and rescission rights that might or could have been available to it, the Old Company, or to the Commissioner as liquidator, including all rights of appeal or review in whatsoever form.

Right of New Company to Settle or Pay Claims Against Old Company

20. In order that claims against the Old Company may be disposed of as speedily and

295 economically as possible, the New Company shall have the right, with the approval of the Commissioner, to settle, compromise or compound any claim or demand against the Old Company or its property, whether or not such claim or demand shall have been filed with the Commissioner and to pay in discharge thereof such amount as may be mutually agreed upon, and if such claim or demand shall not have been so filed, with like force and effect as if such claim or demand had
296 been duly filed with the Commissioner and finally allowed as above set forth; provided, that no such settlement, compromise or compounding shall affect the right of the New Company to contest and litigate any other claims or demands of similar character.

Withholding of Assets

21. In the event of the institution of primary receivership or other proceedings in any of the
297 states other than the State of California, wherein the Old Company has assets and in which proceedings the assets located in any such state are liquidated and distributed exclusively to policyholders, creditors, stockholders or other persons resident of said state, such policyholders, creditors, stockholders and other persons interested in assets of the Old Company, who accept in any such proceeding their pro rata share of the distribution of the assets of the Old Company located in said state, shall not be entitled to the benefits provided in this agreement.

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298 Interpretation of Agreement and Accountings Thereunder

22. In the event of any dispute between the New Company and any person entitled to or who has elected to accept the benefits of this agreement, the determination by the Commissioner as to the interpretation of this agreement shall be conclusive and binding upon both parties to any such dispute. The accounting methods or procedure of the New Company in computing any
299 net profits, earnings or other amounts under this agreement and the amount and character of any and all reserves which may be established by the New Company under this agreement or in the course of its operations following the execution of this agreement, shall be subject to the approval of the Commissioner, and all such accounting matters and computations and amounts and characters of reserves when so approved by the Commissioner shall be conclusive and binding
300 upon the New Company and all persons entitled to any benefit under this agreement, including, but not limited to, persons who may have elected to file their claims with the Commissioner as liquidator.

Commissioner Not Personally Liable

23. The Commissioner is bound by the provisions of this agreement only in his capacity as such Commissioner and as conservator or liquidator of the Old Company. All undertak-

301 ings and obligations herein set forth as undertakings or obligations of the Commissioner are made by the Commissioner only in his said capacities and to such extent as he had authority to make the same, and the Commissioner makes no warranty of his authority to make the same. No personal liability on the part of the Commissioner is assumed under this agreement.

Liabilities of New Company Limited by This Agreement

302 24. It is understood that the New Company does not assume any liability to any stockholders of the Old Company in any way arising out of or by virtue of their stock holdings in the Old Company, nor any liability of any character or description to creditors of the Old Company, whether policyholder creditors or others, except as and to the extent provided in this agreement; it being specifically understood that the New Company does not assume any liability of any 303 character or description whatsoever of the Old Company except as and to the extent in this agreement expressly provided, and the provisions of this agreement shall be a complete and adequate defense by the New Company to any action, other than an action to enforce the express provisions of this agreement, which may be brought by such stockholders or creditors above mentioned.

304 Amendments

25. This agreement may be amended at any time while the Commissioner remains liquidator of the Old Company, by the consent of the Commissioner and the New Company, subject to the approval of the court.

Assignability of Agreement

26. This agreement and all rights, duties and obligations hereunder, shall inure to the benefit of and be binding upon the respective parties
305 hereto, their several successors and assigns.

In Witness Whereof, the New Company has caused this agreement to be executed by its president or vice president, attested by its secretary, and its corporate seal to be hereunto affixed, and the Commissioner has executed this agreement, the day and year first above written.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

By.....

Its President

306 Attest: .....

Its Secretary

"New Company"

.....

As Insurance Commissioner of the State of California and liquidator of The Pacific Mutual Life Insurance Company of California.

"Commissioner"

Endorsed: Filed Jul. 22, 1936. L. E. Lampton, county clerk; by M. E. Howard, deputy.

307 [TITLE OF COURT AND CAUSE.]

Order Permitting, Approving and Authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of the Pacific Mutual Life Insurance Company of California.

Upon reading and filing the verified petition of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, for order
308 permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of The Pacific Mutual Life Insurance Company of California, and it appearing that notice of the filing of said petition has been given to respondent herein, and respondent having appeared in open court by its attorneys and consented to the making of this order, and the court having read and considered the
309 proposed rehabilitation, sale and transfer of assets and reinsurance plan and agreement attached as Exhibit A to said petition, and oral evidence having been taken and the court being fully advised in the premises, and good cause appearing therefor,

The court finds:

1. That it is necessary and desirable that a plan and agreement of rehabilitation and rein-

surance of the affairs of respondent corporation be made and adopted for the protection of the policyholders, creditors and stockholders of said corporation and the conservation of its assets, including the goodwill of its business as a going concern.

2. That the plan and agreement of rehabilitation, sale and transfer of assets, and reinsurance proposed by petitioner herein, a copy of which is attached as Exhibit A to said petition, is fair and equitable and protects the existing legal rights of said policyholders, creditors and stockholders of said respondent corporation.

3. That the organization of a new corporation by petitioner, the execution of an agreement between said new corporation and petitioner, the transfer of certain of the assets held by petitioner as liquidator and formerly owned by said respondent corporation to said new corporation, and the performance of the agreements and covenants of said new corporation set forth in said agreement, all in accordance with the terms of said plan and agreement of rehabilitation, sale of assets and reinsurance, are to the best interests of all policyholders, creditors and stockholders of respondent corporation.

4. That said plan and agreement should be made and placed in operation forthwith.

It is therefore ordered, adjudged and decreed:

1. That said plan and agreement of rehabilitation, sale and transfer of assets and reinsurance, as set forth in Exhibit A of said petition, is hereby approved and declared to be fair and equitable to all interested parties.

2. That petitioner be and he is hereby authorized and ordered forthwith to organize a new corporation and to subscribe to its capital stock by the use of funds and assets under his control as liquidator of respondent corporation, all in accordance with the terms of said plan.

3. That petitioner and said new company upon its organization be and they hereby are authorized and ordered forthwith to execute an agreement in form substantially as set forth in said plan.

4. That petitioner be and he hereby is authorized, permitted and ordered forthwith to transfer and set over to said new corporation, upon the execution of said agreement, all of the assets of respondent corporation the title to which is now or may hereafter be vested in him, except the stock of said new corporation, and also

except any and all rights or claims of whatsoever nature which respondent corporation or the liquidator, in his capacity as liquidator of respondent corporation, may have against any of the present or past officers, directors or employees, as such, of respondent corporation, or against any other person, firm or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors or employees of respondent corporation, including rights or claims on any fidelity or surety bond or bonds given to or in favor of respondent corporation to secure the faithful performance by any of its officers, directors or employees of any of their duties as such.

5. That said new corporation be and it hereby is authorized and ordered forthwith, upon the execution of said agreement and the transfer of said assets, to commence and carry on the business of an insurance company as permitted by its articles of incorporation and by the laws of the state of California, including the assumption or reinsurance to the extent provided in said agreement of policies of insurance made or written by respondent corporation, and including the execution of new policies.

6. That petitioner and said new company be and they hereby are authorized and ordered to

do any and all things necessary, desirable or proper to carry out the terms of said plan and agreement of rehabilitation, sale and transfer of assets and reinsurance, either in the state of California or elsewhere.

7. That the officers, directors, agents and employees of said respondent corporation be and they hereby are directed to cooperate with and assist petitioner and said new company in the effectuation of said plan by the execution of such documents of transfer or conveyance or otherwise and the doing of such acts in connection therewith as may be requested of them by petitioner.

Dated: July 22, 1936.

DOUGLAS L. EDMONDS,
Judge.

Endorsed: Filed Jul. 22, 1936. L. E. Lampton, county clerk; by M. E. Howard, deputy.

Entered Jul. 24, 1936; docketed Jul. 24, 1936, book 949, page 36, by I. Bottomley, deputy.

322 [TITLE OF COURT AND CAUSE.]

Petition for Approval of Amendment of Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement.

Comes now Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, and as liquidator of The Pacific Mutual Life Insurance Company of California, and alleges:

(1) That petitioner is the duly appointed,
323 qualified and acting Commissioner of Insurance of the State of California, and as such the petitioner in these proceedings. That pursuant to order entered herein on July 22, 1936, petitioner, as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, made and entered into with Pacific Mutual Life Insurance Company that certain Rehabilitation, Sale and Transfer of Assets and Reinsurance
324 Agreement hereinafter referred to. That pursuant to paragraph 25 of said agreement above mentioned, the said agreement may be amended by the consent of the petitioner and Pacific Mutual Life Insurance Company, subject to the approval of this court. That it now appears to be desirable and to the best interest of petitioner as commissioner and liquidator as aforesaid, and to the best interests of Pacific Mutual Life Insurance Company, that said agreement be amended in particulars hereinafter set forth.

325 (2) That the amendment proposed to be made in said agreement is to amend paragraph 15 thereof so that the same will read as set out in paragraph 15 of the proposed amended agreement which is hereto attached and marked Exhibit A and made a part hereof. The petitioner is advised that Pacific Mutual Life Insurance Company has consented to said proposed amendment.

326 Wherefore, your petitioner prays that this court make its order approving the amendment to said agreement above referred to and authorizing and directing your petitioner in order to make said amendment effective, to execute and deliver an Amended Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement substantially in the form set out in Exhibit A hereto attached.

Dated: July 23, 1936.

327 SAMUEL L. CARPENTER, JR.,
Insurance Commissioner of the State of California, as Liquidator,

Petitioner.

U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Petitioner.

Verified.

328 EXHIBIT "A"

REHABILITATION, SALE AND TRANSFER OF ASSETS AND REINSURANCE AGREEMENT

Between

PACIFIC MUTUAL LIFE INSURANCE COMPANY

And

SAMUEL L. CARPENTER, JR.

As Insurance Commissioner of the State of California and as Liquidator of

329 THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

Dated July 22, 1936.

As Amended July 23, 1936

Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement.

This Agreement, made and entered into this

330 23rd day of July, 1936, between Pacific Mutual Life Insurance Company, a California corporation, and Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, a California corporation,

Witnesseth:

Whereas, an order was entered in the Superior Court of the State of California in and for the County of Los Angeles on the 22nd day of July, 1936, in a proceeding entitled "Samuel L. Car-

penter, Jr. Insurance Commissioner of the State of California, Petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, Respondent," by which the court found that The Pacific Mutual Life Insurance Company of California was in such condition that its further transaction of business would be hazardous to its policyholders, creditors and to the public, and that said Company was insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1, of the Insurance Code of the State of California, and by which said order title to all of the assets of said Company, wheresoever situated, was vested in Samuel L. Carpenter, Jr. in his official capacity as Insurance Commissioner of the State of California, and by which order said Commissioner was directed forthwith to take possession of all of the books, records, property, real and personal, and assets of said Company and to conduct as conservator the business of said Company, and enjoining said Company and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until the further order of said court, and pursuant to said order said Commissioner has become vested with the title to and did take possession of all of the books, records, property, real and personal, and assets of said Company; and

Whereas, said Commissioner as conservator as aforesaid, did thereafter apply to said court

for an order for the liquidation of said Company and for an order directing the Commissioner to formulate and submit a plan and agreement of rehabilitation and reinsurance which, in the judgment of the Commissioner, would best preserve the value of the estate in liquidation, provide for the removal of the causes which made the proceeding necessary, and most fairly and equitably protect the rights and claims of all persons interested therein; and

Whereas, said court thereafter made and entered an order for the liquidation of said Company, appointing the Commissioner as liquidator thereof, and as such vested with title to all of the assets of said Company, and directing the Commissioner to file such a plan; and

Whereas, said Commissioner submitted to said court a Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement, alleging that said plan and agreement will preserve the value of the assets in liquidation, is fair and equitable to the policyholders, creditors and stockholders of said Company, and protects the legal rights of all interested parties as they now exist; and

Whereas, thereafter said court made and entered an order approving said plan and agreement, and finding that said plan and agreement is fair and equitable and protects the existing legal rights of the policyholders, creditors and

337 stockholders of said Company, and directing that the Commissioner proceed to consummate said plan and execute this agreement;

Whereas, pursuant to said order last mentioned, Pacific Mutual Life Insurance Company and Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, made and entered into on July 22, 1936, a Rehabilitation Sale and
338 Transfer of Assets and Reinsurance Agreement (hereinafter referred to as the original agreement), and

Whereas said original agreement provided in Paragraph 25 thereof that the same might be amended at any time while the Commissioner remains liquidator of The Pacific Mutual Life Insurance Company of California, by the consent of said Commissioner and of Pacific Mutual Life Insurance Company, subject to the approval of
339 the court, and

Whereas said Commissioner remains liquidator of The Pacific Mutual Life Insurance Company of California and said Commissioner did on July 23, 1936, propose that Paragraph 15 of the original agreement be amended in certain respects and filed his petition with the court for the approval of such proposed amendment and for the approval of the execution of this agreement to provide for said amendment, and

Whereas Pacific Mutual Life Insurance Company has consented to said proposed amendment and the court has made its order under date of July 23, 1936, approving said amendment and the execution of this agreement;

Now, Therefore, in consideration of the premises and of the respective undertakings of the parties hereto, it is hereby agreed that the above mentioned original agreement executed under date of July 22, 1936, shall be, and the same hereby is, amended so that Paragraphs 1 to 26, both inclusive, of said original agreement shall read in words and figures as hereinafter set out in Paragraphs 1 to 26, both inclusive, of this agreement, to-wit:

Now, Therefore, in consideration of the premises and of the respective undertakings of the parties hereto, It Is Hereby Agreed:

Definitions

1. The parties to this agreement and the persons mentioned herein will be referred to and certain terms used herein are hereby defined as follows:

Samuel L. Carpenter, Jr., in his capacity as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and any successor Commissioner and liquidator, will be referred to as "Commissioner."

343 The Pacific Mutual Life Insurance Company of California will be referred to as the "Old Company."

Pacific Mutual Life Insurance Company will be referred to as the "New Company."

The Superior Court of the State of California in and for the County of Los Angeles will be referred to as the "Court."

The date and hour of entry of said order of liquidation, to wit, July 22, 1936, at one o'clock
344 P. M. Pacific Standard Time, will be referred to as the "date of liquidation."

This agreement shall be deemed to have been executed and shall be effective as of the date and hour of entry of said order of liquidation, and said date and hour will be referred to as the "effective date of this agreement."

The phrase "assets of the Old Company" or any similar phrase used in this agreement shall be deemed to mean all books, records, property,
345 real and personal, tangible and intangible, and all other assets of every kind, character and description whatsoever, and wheresoever situated, owned by the Old Company at the time of the appointment of the Commissioner as conservator which shall not have been applied by him against his subscription for stock of the New Company or disposed of by him in the due course of his administration as conservator or in his administration as liquidator of the Old Company, plus

346 all property acquired by the Commissioner in either of said capacities and the income therefrom collected by him, except (a) the stock of the New Company held by him, and (b) any and all rights or claims of whatsoever nature which the Old Company or the Commissioner, in his capacity as liquidator of the Old Company, may have against any of the present or past officers, directors or employees, as such, of the Old Company, or against any other person, firm
347 or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors or employees of the Old Company, including rights or claims on any fidelity or surety bond or bonds given to or in favor of the Old Company to secure the faithful performance by any of its officers, directors or employees of any of their duties as such.

Outstanding policies of the Old Company known as its Non-Cancelable Income Policies,
348 including the Aggregate form thereof, will be referred to as "Non-Can Policies."

Transfer of Assets

2. The Commissioner shall grant, bargain, sell, assign, convey, transfer, set over and deliver to the New Company the assets of the Old Company.

The Commissioner shall not be required to make manual delivery of any cash or securities deposited by the Old Company with any govern-

mental authority as a condition to the conduct of its business, but shall only be required to assign his interest therein, subject to the terms of such deposit.

The Commissioner shall transfer and deliver to the New Company the full amount of all premiums paid to the Commissioner on any policy reinsured and assumed hereunder which have been paid in to the Commissioner on or after the date of liquidation, and the New Company shall credit the holder of such policy with the payment of such premiums accordingly, subject to repayment as hereinafter provided in the event the holder of such policy shall elect not to accept such reinsurance and assumption by the New Company. The New Company shall repay to the Commissioner upon demand any premium received by the New Company hereunder from the Commissioner which was paid by or on behalf of the insured after the date of liquidation to the Commissioner, if the policyholder has filed or shall file a claim in accordance with the Commissioner's notice requiring the filing of claims in the above mentioned cause, and the court shall direct the Commissioner to return the premium so paid.

Subsequent to the effective date of this agreement and for such period of time as the Commissioner may determine, no investment or reinvestment of the assets of the Old Company transferred to the New Company pursuant to

this agreement shall be made without first obtaining the written approval of the Commissioner. The Commissioner hereby agrees that said period shall in no event exceed six months from and after the effective date of this agreement.

Reinsurance and Assumption of Policies Other Than Non-Can Policies

3. The New Company does hereby reinsure and assume, as of the date of liquidation, with the exception hereinafter provided, the liability of the Old Company under all life, endowment annuity and term policies and contracts of insurance, and all other policies and contracts of insurance, including, without limiting the same to, health and accident benefits, waiver of premium disability benefits, permanent and total disability benefits, and all supplementary contracts, annuity contracts and all reinsurance contracts, issued or assumed by the Old Company and outstanding and in force on the books and records of the Old Company at the date of liquidation, subject, however, to any and all defenses, offsets, counterclaims, cross-complaints and rescission rights against said policies or contracts or against any claims and actions thereon, which would have been available to the Old Company had this agreement not been made; provided, however, that all outstanding Non-Can Policies are not reinsured or assumed under this paragraph and

355 are hereby expressly excepted from the obligations of the New Company under this paragraph. The determination by the New Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so reinsured hereunder.

Reinstatement of Lapsed Policies

4. The New Company will reinstate any poli-
356 cies heretofore issued, assumed or reinsured by the Old Company, which are not excepted from the obligations of the New Company contained in the foregoing paragraph and which at the date of liquidation, by their terms, were entitled to reinstatement, provided that all requirements necessary to procure a reinstatement of said policies under their terms are fulfilled to the satisfaction of the New Company.

The New Company will also reinstate, during
357 the lifetime of the insured and provided the insured is not in such condition as to be eligible for benefits under the policy, without evidence of insurability, any of said policies, with the aforesaid exception, which have lapsed since the date of liquidation, upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made and premiums are paid within sixty (60) days after the effective date of this agreement. Upon the reinstatement of such lapsed policy it shall,

for all purposes, be treated the same as if it had been in force on the date of liquidation and be subject to the terms and conditions of this agreement.

Payment of Policy Claims Other Than Claims on Non-Can Policies

5. The New Company will pay in full, in accordance with the terms and conditions of the policies or other contracts under which the claims shall have been or may be made, and whether or not the claims arose or matured prior or subsequent to the date of liquidation, all claims (except claims on Non-Can Policies) including, without limiting the same to, claims for death benefits, matured endowments, annuity payments, permanent total disability and premium waiver benefits; accident and sickness benefits, payments under policy settlement agreements, policy dividends left at interest with the Old Company prior to the date of liquidation, and payments under all other matured contracts under which the proceeds of policies and contracts were left with the Old Company prior to the date of liquidation; subject, however, to any and all defenses, offsets, counter-claims, cross-complaints and rescission rights against any such claim or claims which would have been available to the Old Company had this agreement not been made.

361 Reinsurance and Assumption of Non-Can Policies

6. The New Company does hereby reinsure and assume, as of the date of liquidation, the liability of the Old Company under all Non-Can Policies issued by the Old Company and outstanding and in force on the books and records of the Old Company at the date of liquidation, subject, however, to the terms, conditions and limitations, and only to the extent hereinafter
362 specifically provided and subject, further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against such policies or any claims and actions thereon which would have been available to the Old Company had this agreement not been made. The determination by the New Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so rein-
363 sured hereunder.

Terms, Conditions, Limitations and Extent of Reinsurance and Assumption of Non-Can Policies

7. The obligation of the New Company with respect to the payment of monthly disability benefits on claims either filed or notice of which is filed with the New Company or any of its predecessors at any time after the date of liquidation under Non-Can Policies reinsured and

364 assumed under the preceding paragraph, subject to restoration as provided in paragraph 8 hereof, shall be limited to payment of the following percentages of the monthly disability benefits originally provided under said policies, according to the following premium classes, respectively:

365 Premium Class of Policy	Percentage of Original Monthly Benefit Assumed By New Company
1918 Premium class	
Issued under Rate Books:	
A 1445, A 1445 Z, A 1445 Y,	
A 1445 X and A 1445 W.	20%
in period from:	
August, 1918—September, 1921	
1921 Premium class	
Issued under Rate Books:	
366 A 1687, A 1687 Z, A 1687 Y,	
A 1687 X, A 1687 W.	35%
in period from:	
September, 1921—July, 1926.	
1926 Premium class	
Issued under Rate Books:	
A 1958, A 1958 Z, A 1958 Y,	45%
in period from:	
July 1926—February, 1929.	

367 1929 Premium class
Issued under Rate Books:
A 2293 55%
in period from:
February, 1929—January, 1931.

1931 Premium class
Issued under Rate Book:
A 2367 65%
in period from:
January, 1931—March, 1932.

368 1932 Premium class
Issued under Rate Books:
A 2432, A 2432 Z, A 2499 90%
in period from:
March, 1932—February, 1935.

Aggregate policy
Issued under Rate Books:
A 2499, A 2567 90%
in period from:
369 October, 1933—July, 1935.

Note: All of the above mentioned Rate Books are Rate Books issued by the Old Company and copies are on file at the office of the New Company at 523 West Sixth Street, Los Angeles, California, and in the offices of the Insurance Commissioners or similar public officials of each state in which the Old Company has been transacting insurance business.

Notwithstanding the foregoing limitation on the obligation of the New Company to make monthly disability payments on such policies,

370 there shall be no change or reduction in the original premium rates on such policies, and to be entitled to the reinsurance and assumption of his Non-Can Policy by the New Company as aforesaid, the policyholder shall be obligated to continue to make premium payments at the rate originally provided in his policy.

Restoration of Non-Can Benefits

8. The New Company shall be obligated to
371 restore the monthly disability benefits originally provided in the Non-Can Policies reinsured and assumed under this agreement by applying, and only by applying, to such extent and in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance Commissioner of the State of California as hereinafter provided, sums equivalent to the following:

(a) The net profits derived by the New Com-
372 pany from that portion of the business of its accident and health department represented by accident and health policies reinsured and assumed under this agreement, including all Non-Can Policies so reinsured and assumed hereunder; and

(b) The net profits derived by the New Company from that portion of the business of the nonparticipating branch of its life department represented by nonparticipating life insurance policies reinsured and assumed hereunder.

373 As of December 31, 1938, and tri-annually thereafter or at the time of the regular examination of the New Company by the Insurance Commissioner of the State of California, the New Company shall render to such Commissioner an accounting of the net profits, if any, arising from the sources referred to in (a) and (b) above, including the New Company's proposal as to the extent and manner of the application of sums equivalent to such net profits to the restora-
374 tion of benefits on said Non-Can Policies. Any such proposal may include provision for proportionate restoration of commissions to agents, who through accepting the assumption of their contracts on the basis hereinafter provided, have received less commissions on such policies than they otherwise would have received. After the approval of any such proposal by said Commissioner with such changes as he may require therein, the New Company shall proceed to put
375 said proposal into effect. The extent and manner of the restoration, as provided in any such proposal so approved by said Commissioner, shall be binding upon all holders of said Non-Can Policies and other persons interested therein.

The holders of any such Non-Can Policies surrendered to the New Company in connection with any settlement thereunder shall not be entitled thereafter to any of the benefits of such restoration.

376 The holders of any such Non-Can Policies which shall have lapsed after the date of liquidation and which shall not have been reinstated either in accordance with their terms or in accordance with the provisions of this agreement, shall not be entitled thereafter to any of the benefits of such restoration.

Reinstatement of Lapsed Non-Can Policies

9. The provisions of paragraph 4 of this agreement with respect to reinstatement of lapsed
377 policies shall apply to Non-Can Policies, subject to the terms, conditions and limitations contained in paragraphs 6 and 7 hereof.

Payment of Claims on Non-Can Policies Filed Prior to Date of Liquidation

10. The New Company shall be obligated to continue the payment of all disability benefits under Non-Can Policies, claims or notices of claims for which had been filed with the Old Company prior to the date of liquidation, and
378 all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to any such settlement agreements; and subject, further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company had this agreement not been made.

379 Moratorium

11. The reinsurance and assumption of obligations by the New Company herein provided for are subject to the condition that the new Company shall not be required, prior to sixty (60) days, and such additional period as may be determined by the Commissioner, from and after the effective date of this agreement, to make policy loans (except for the purpose of paying premiums on the same policy or on addi-
380 tional policies issued on the same life), or to pay cash surrender values. This provision, however, shall not apply to any increase in values that are accumulated from premium payments or loan repayments which are received subsequent to the date of liquidation.

During such period as the moratorium is in effect the cash surrender option of all policies of the Old Company may be considered as non-existing, except as provided above, and all policy-
381 holders who do not pay their premiums and who are entitled to a guaranteed value will be restricted to the automatic nonforfeiture value (properly adjusted for any policy indebtedness and accrued interest thereon) under the policy. At the discretion of the New Company, however, the cash surrender value under any policy, properly adjusted for any policy indebtedness and accrued interest thereon, may be allowed whenever it appears, in the sole judgment of the New

382 Company, that the granting of such surrender value will be to the advantage and benefit of the Old Company policyholders as a class.

Assumption of Claims Against Old Company

12. The New Company hereby assumes and agrees to pay the following:

(a) All costs and expenses of the Commissioner in his capacities as conservator or liquidator of the Old Company, including attorneys' fees, as finally approved by the court;

383 (b) All unpaid taxes legally due the United States, the State of California, and other States, and Counties and Municipalities thereof, in connection with the business and assets of the Old Company, and remaining unpaid;

(c) Wages and salaries legally due to persons employed by the Old Company for services rendered and current bills for office supplies and incidental expenses in connection with the operation of the business of the Old Company and remaining unpaid;

384

(d) All claims against the Old Company filed with the Commissioner as liquidator, and finally allowed by the Commissioner and/or by the Court.

The obligation of the New Company with respect to items (a), (b), (c) and (d) above shall be to pay the same, in the order of preference established by law, and shall be limited, in the aggregate, to an amount equal to the value

385 of the assets of the Old Company transferred to the New Company pursuant to this agreement, on the basis of valuation provided in paragraph 13 of this agreement, less the amount of the reserves established by the New Company, with the approval or in accordance with the requirements of the Commissioner, with respect to policies of the Old Company reinsured and assumed by the New Company hereunder, and with respect to policy claims assumed by the New Com-
386 pany hereunder.

Valuation of Assets Transferred to New Company

13. The assets of the Old Company transferred to the New Company pursuant to this agreement shall be valued at the amounts established therefor in the so-called "Convention Report" made in 1936 by the Commissioner and similar officials of certain other states in which
387 the Old Company did business, with respect to the condition of the Old Company, as of December 31, 1935.

Agents

14. The New Company hereby assumes, subject to the limitation and exception hereinafter stated, any obligations under any contract heretofore made by the Old Company with any agent (regardless of classification), manager, or supervisor, it being recognized that the services of the agents who produced, or under his direction

or supervision was produced, the business reinsured or assumed hereunder in servicing said business, and the maintaining of same in force as to the ultimate interest and advantage of the policyholders of the Old Company. However, the obligations of the Old Company to pay commissions on Non-Can Policies reinsured and assumed by the New Company, with the limitations as to disability benefits hereinbefore provided, shall be reduced as follows: (a) No commissions due after the date of liquidation shall be paid on Non-Can Policies on all forms issued prior to and including Forms A291 to A294, both inclusive, and commissions due after the date of liquidation on all Non-Can Policies issued on all other forms, the holders of which accept and reinsure their assumption by the New Company on the reduced basis hereinbefore provided, shall be reduced in proportion to the reduction in disability benefits to the insured under such policies. The New Company shall not assume or be bound by any agreement which the Old Company may have made with agents with respect to payment of commissions on policies after lapsation. To such extent, in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance Commissioner of the State of California, as provided in paragraph 8 of this agreement, the New Company shall apply its net profits derived from the sources referred to in (a) and (b) of said

391 paragraph 8 to the restoration to agents of the amounts of the reduction in their commissions on policies referred to in (b) of this paragraph to which said agents would have otherwise been entitled.

Additional Payments on Allowed Claims and Payments to Stockholders of Old Company

15. For a period of ten (10) years commencing January 1, 1937, the New Company shall pay to the Commissioner for the benefit of hold-
392 ers of claims filed with the Commissioner and finally allowed by him or by the court, until such claims shall have been paid in full, and thereafter for the benefit of and distribution to the stockholders of the Old Company, the net profits of the New Company derived from the sources referred to in (a) and (b) of paragraph 8 of this agreement remaining after:

(a) The holders of Non-Can Policies referred to in said paragraph 8 shall have been restored
393 to the full benefits originally stated in their policies as provided in said paragraph; and

(b) The New Company shall have established such reserves as may be deemed necessary by the New Company and the Commissioner for proper depreciation of the assets allocated to, or held by, the New Company for the benefit of the departments referred to in (a) and (b) of said paragraph 8; and

(c) Restoring to surplus allocated to the participating life department of the New Company

394 the sum of $1,792,118.97, or its equivalent, together with interest thereon to date of restoration at the average rate earned by the New Company during such period on its invested assets; and

(d) Creating a reserve or adding to the surplus of the New Company an amount equal to the amount of policy reserve for Non-Can Policies released by reason of lapsation of such policies reinsured and assumed hereunder in excess of a lapse rate of ten per cent (10%) per year,
395 or occasioned by substitutions or exchanges of such policies for other types of accident or health insurance.

At the end of said ten (10) year period, to-wit, on January 1, 1947, the New Company shall either (1) create a fund equal to $10 per $1000 of nonparticipating life insurance reinsured and assumed by the New Company under this agreement and then remaining in force, or, (2) until said fund shall be so created, pay an amount
396 equal to interest at the rate of six per cent (6%) per annum on an amount equal to said fund computed as aforesaid, which fund, and, until the creation thereof, said interest payments, shall be applied, first, to the extent necessary to complete the restoration and establishment of reserves referred to in (a), (b), (c) and (d) above, and, second, to the payment to the Commissioner to the extent necessary to pay any unpaid balance of claims filed with the Commissioner and finally allowed, and thereafter to

distribution pro rata to the stockholders of the Old Company.

Any such payments to stockholders of the Old Company, in accordance with the foregoing, shall either be made pro rata to such stockholders, as their interests may appear according to the stock ledgers of the Old Company, or the New Company may issue to the Commissioner or to such stockholders appropriate certificates of the New Company evidencing its obligation to make such payments. Such certificates of interest may either be issued by the New Company to the Commissioner for distribution by him to stockholders of the Old Company in exchange for their stock certificates, or, at the election of the New Company, may be issued by the New Company directly to such stockholders upon the surrender of their stock certificates.

Mutualization of New Company

16. The New Company hereby consents to such plan for its voluntary mutualization in accordance with the laws of the State of California as now in effect or hereafter amended, as may be proposed by the Commissioner, as soon as legally possible; and the Commissioner agrees to propose such mutualization plan, as the holder of the stock of the New Company. Such mutualization plan shall contain such terms and provisions, not inconsistent with this agreement, as may be required by law or approved by the Commissioner and the New Company. The purchase

400 price paid by the New Company for the acquisition of its outstanding stock pursuant to such mutualization plan to the extent not required by the Commissioner as the holder of said stock for the satisfaction of claims against the Old Company, filed with the Commissioner and finally allowed, shall be repaid by the Commissioner to the New Company.

Notice

17. The New Company shall mail promptly
401 to the insured named in all policies and supplementary contracts of the Old Company in force at the date of liquidation, and any assignees thereof of record, a printed copy of the Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan concerning the Old Company, including a copy of this agreement as executed, to which the New Company may attach its certificate of reinsurance and assumption, inserted in an envelope, first class postage prepaid, ad-
402 dressed to the name and address of each of the persons aforesaid last shown upon the records of the Old Company. By "assignees of record" is meant assignees appearing upon the records of the Old Company at its Home Office.

Election of Policyholders and Claimants and Effect Thereof

18. Each policyholder and policy claimant of the Old Company may elect either to accept the reinsurance and assumption of his policy or con-

tract and/or any claim thereunder by the New Company, as provided in this agreement, or to file his claim against the Old Company with the Commissioner, in the manner provided by the Insurance Code of the State of California with respect to the filing of claims against an insurer in the process of liquidation. Persons so filing claims, who shall not withdraw them as hereinafter provided, are herein referred to as dissenting policyholders. The filing of a claim by any dissenting policyholder shall remove the policy or contract in respect of which said claim shall be filed, and the claim of persons under such policy or contract from the benefit of the provisions of this agreement with respect to reinsurance and/or assumption, and shall constitute an irrevocable election, on the part of such policy or contract holder, and his beneficiary and all persons claiming under him, not to accept the benefit of such reinsurance and/or assumption provisions unless such claim shall be withdrawn by the claimant at any time prior to the expiration of sixty (60) days from and after the date of the expiration of the time for filing claims, as provided by law, with the written consent of the New Company, in which event such policy or contract, and the persons interested in the benefits thereunder, shall be entitled to the benefit of such reinsurance and/or assumption provisions and shall be bound by this agreement.

406 Every person entitled to accept any benefit under this agreement, who shall have indicated his election so to do either by not filing any such claim, or by withdrawing such claim if filed, shall be considered as assigning to the New Company all his claims against the Old Company, and the benefits of any rights, securities, liens, or preferences to which he may be entitled by reason of his claims and also as so assigning all interest to which his claims may entitle him
407 in all of the assets of the Old Company, whether located in California or elsewhere. The New Company shall be entitled to assert and prosecute its claims, securities, liens or preferences of all holders of policies or contracts, issued or assumed by the Old Company, who so assent to or become bound by the provisions of this agreement, and the New Company shall be entitled to assert and obtain in such manner as it may deem best, any rights, securities, liens, or prefer-
408 ences to which the holders of policies or contracts issued or assumed by the Old Company, who shall so assent to or become bound by the provisions of this agreement, would have had.

Each holder of any policy or contract issued or assumed by the Old Company, who shall not have filed his claim against the Old Company with the Commissioner in the manner and within the period required by law, shall be deemed ipso facto to have assented to and become bound by the provisions of this agreement, and entitled

409 to the benefits hereof, subject to all of its terms. No holder of any such policy or contract of the Old Company who shall be deemed to have assented to or become bound by the provisions of this agreement shall have any rights, securities, liens, or preferences not accorded by this agreement.

Right of the New Company to Prosecute and Defend Claims

19. All claims or demands against the Old
410 Company or its property now the subject of litigation in any court of competent jurisdiction in actions against the Old Company, and any and all claims and demands against the Old Company or its property filed with the Commissioner as liquidator, may be prosecuted and defended until final judgment, and the New Company shall have the right to assist and join in such defense through counsel selected and paid by the New Company, and with all defenses, offsets,
411 counterclaims, cross-complaints and rescission rights that might or could have been available to it, the Old Company, or to the Commissioner as liquidator, including all rights of appeal or review in whatsoever form.

Right of New Company to Settle or Pay Claims Against Old Company

20. In order that claims against the Old Company may be disposed of as speedily and economically as possible, the New Company shall

412 have the right, with the approval of the Commissioner, to settle, compromise or compound any claim or demand against the Old Company or its property, whether or not such claim or demand shall have been filed with the Commissioner and to pay in discharge thereof such amount as may be mutually agreed upon, and if such claim or demand shall not have been so filed, with like force and effect as if such claim or demand had been duly filed with the Commissioner and finally
413 allowed as above set forth; provided, that no such settlement, compromise or compounding shall affect the right of the New Company to contest and litigate any other claims or demands of similar character.

Withholding of Assets

21. In the event of the institution of primary receivership or other proceedings in any of the states other than the State of California, wherein the Old Company has assets and in which pro-
414 ceedings the assets located in any such state are liquidated and distributed exclusively to policyholders, creditors, stockholders or other persons resident of said state, such policyholders, creditors, stockholders and other persons interested in assets of the Old Company, who accept in any such proceeding their pro rata share of the distribution of the assets of the Old Company located in said state, shall not be entitled to the benefits provided in this agreement.

415 Interpretation of Agreement and Accountings Thereunder

22. In the event of any dispute between the New Company and any person entitled to or who has elected to accept the benefits of this agreement, the determination by the Commissioner as to the interpretation of this agreement shall be conclusive and binding upon both parties to any such dispute. The accounting methods or procedure of the New Company in computing
416 any net profits, earnings or other amounts under this agreement and the amount and character of any and all reserves which may be established by the New Company under this agreement or in the course of its operations following the execution of this agreement, shall be subject to the approval of the Commissioner, and all such accounting matters and computations and amounts and characters of reserves when so approved by the Commissioner shall be conclusive
417 and binding upon the New Company and all persons entitled to any benefit under this agreement, including, but not limited to, persons who may have elected to file their claims with the Commissioner as liquidator.

Commissioner Not Personally Liable

23. The Commissioner is bound by the provisions of this agreement only in his capacity as such Commissioner and as conservator or liquidator of the Old Company. All undertakings and obligations herein set forth as under-

takings or obligations of the Commissioner are made by the Commissioner only in his said capacities and to such extent as he had authority to make the same, and the Commissioner makes no warranty of his authority to make the same. No personal liability on the part of the Commissioner is assumed under this agreement.

Liabilities of New Company Limited by This Agreement

24. It is understood that the New Company does not assume any liability to any stockholders of the Old Company in any way arising out of or by virtue of their stock holdings in the Old Company, nor any liability of any character or description to creditors of the Old Company, whether policyholder creditors or others, except as and to the extent provided in this agreement; it being specifically understood that the New Company does not assume any liability of any character or description whatsoever of the Old Company except as and to the extent in this agreement expressly provided, and the provisions of this agreement shall be a complete and adequate defense by the New Company to any action, other than an action to enforce the express provisions of this agreement, which may be brought by such stockholders or creditors above mentioned.

Amendments

25. This agreement may be amended at any time while the Commissioner remains liquidator

421 of the Old Company, by the consent of the Commissioner and the New Company, subject to the approval of the court.

Assignability of Agreement

26. This agreement and all rights, duties and obligations hereunder, shall inure to the benefit of and be binding upon the respective parties hereto, their several successors and assigns.

The original agreement, as hereby amended, is ratified, confirmed, approved and continued in 422 full force and effect.

In Witness Whereof, the New Company has caused this agreement to be executed by its president or vice president, attested by its secretary, and its corporate seal to be hereunto affixed, and the Commissioner has executed this agreement, the day and year first above written.

PACIFIC MUTUAL LIFE INSURANCE COMPANY.

By.....

Its President

423

Attest: .....

Its Secretary.

"New Company"

.....

As Insurance Commissioner of the State of California and liquidator of The Pacific Mutual Life Insurance Company of California.

"Commissioner"

Endorsed: Filed July 23, 1936. L. E. Lampton, county clerk; by M. E. Howard, deputy.

424 [TITLE OF COURT AND CAUSE.]

Order Approving Amendment of Rehabilitation Sale and Transfer of Assets and Reinsurance Agreement.

Upon reading and filing the verified application of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as liquidator of The Pacific Mutual Life Insurance Company of California, for order approving the amend-
425 ment of Rehabilitation Sale and Transfer of Assets and Reinsurance Agreement dated July 22, 1936, and for authority to execute an amended Rehabilitation Sale and Transfer of Assets and Reinsurance Agreement for the purpose of giving effect to said amendment, and consent to the making of said amendment and execution of said amended agreement having been given by
426 Pacific Mutual Life Insurance Company, and oral evidence having been taken and the court being fully advised in the premises and good cause appearing therefor:

The court finds that the proposed amendment and the execution of the proposed amended agreement is in the best interests of said Insurance Commissioner as liquidator aforesaid, and in the best interests of Pacific Mutual Life Insurance

427 Company and that said amendment and said amended agreement should forthwith be executed and put into effect:

It is therefore ordered, adjudged and decreed that the proposed amendment to the Rehabilitation Sale of Assets and Reinsurance Agreement dated July 22, 1936, be, and the same is, hereby approved;

428 It is further ordered that Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as liquidator of The Pacific Mutual Life Insurance Company of California, be, and he is, hereby authorized and directed to execute for the purpose of making said amendment effective an amended Rehabilitation Sale and Transfer of Assets and Reinsurance Agreement substantially in the form attached to said application as 429 Exhibit "A".

Dated: July 23, 1936.

DOUGLAS L. EDMONDS,

Judge.

Endorsed: Filed Jul. 23, 1936. L. E. Lampton, county clerk; by M. E. Howard, deputy.

Entered Jul. 24, 1936. Docketed Jul. 24, 1936, book 949, page 37, by I. Bottomley, deputy.

430 In the Superior Court of the state of California in and for the county of Los Angeles,

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent, Pacific Mutual Life Insurance Company, a corporation, intervener. No. 404673.

Petition for Intervention and for Order to

431 **Show Cause.**

Comes now Pacific Mutual Life Insurance Company, a California corporation, and for its petition in intervention alleges:

I.

Your intervener is a corporation organized and existing under the laws of the state of California, and authorized and qualified to conduct a life, disability, liability, common carrier and workman's compensation insurance business.

432

II.

On or about the 22nd day of July, 1936, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, pursuant to application duly made by him, was duly appointed conservator of The Pacific Mutual Life Insurance Company of California, the respondent corporation herein. Subsequently, and upon the same day, on application duly made by him, he was duly appointed liquidator of said corpora-

433 tion and duly ordered to wind up and liquidate the business thereof. Subsequent thereto, and on or about the same day, said Samuel L. Carpenter, Jr., as such Insurance Commissioner of the State of California and as such liquidator, duly presented to this court a proposed plan and agreement of rehabilitation, sale and transfer of assets and reinsurance of said The Pacific Mutual Life Insurance Company of California, a copy of which said plan and agreement is attached
434 hereto as Exhibit A. Thereafter, upon said day, this court made its order wherein, among other things, it permitted, approved and authorized said plan and agreement of rehabilitation, sale and transfer of assets and reinsurance and directed that the same be carried out in all its particulars.

III.

Pursuant to directions contained in said order, said Commissioner and liquidator caused your
435 intervener to be duly organized and subscribed to the stock thereof, all as proposed in said plan and directed by said order. Further, said Commissioner and liquidator and your intervener, as directed by said order, executed an agreement substantially in the form set forth in said plan and agreement presented to this court, a copy of which agreement, as executed, is attached hereto as Exhibit B; and said Commissioner and liquidator duly transferred and set over to your

436 intervener by deed and bill of sale all of the assets of said The Pacific Mutual Life Insurance Company of California then vested in him as such liquidator, with certain exceptions provided for in said agreement and in said deed and bill of sale, a copy of which said deed and bill of sale, as executed by said Commissioner and liquidator and by respondent corporation and by your intervener, is attached hereto as Exhibit C. As directed by said order above mentioned, your
437 intervener has commenced and is now carrying on the business of an insurance company as permitted by its articles of incorporation and by the laws of the State of California. Pursuant to petition filed by said Commissioner and liquidator, this court made its order on July 23, 1936, approving a certain amendment to the above mentioned agreement attached hereto as Exhibit B, and authorizing and directing, in order to make effective said amendment, the execution of the
438 amended agreement referred to in said order, which amended agreement has been duly executed by said Commissioner and liquidator and by your intervener, and a copy thereof as so executed and as delivered is attached hereto and marked Exhibit D,

IV.

Your intervener believes that it is desirable, as a further assurance and confirmation of the titles heretofore conveyed and transferred, that the adoption of said plan and agreement of re-

habilitation, sale and transfer of assets and re-insurance by your intervener and by said Commissioner and liquidator, the execution of said agreement and amended agreement by your intervener and said liquidator and the transfer of said assets from said liquidator to your intervener and the execution of said deed and bill of sale should be confirmed and approved by this court after a hearing held upon order to show cause directed to all interested parties, wherein they may have opportunity to express any objections they might have to such confirmation and approval. Wherefore your intervener has an interest in the matters being considered in the proceeding herein and desires that the relief hereinafter prayed for be granted. Your intervener further believes it to be desirable that a hearing be had upon the fairness of the terms and conditions upon which it is proposed, pursuant to said plan and/or agreement, to issue and exchange securities in exchange for one or more *bona fide* outstanding securities, claims or property interests, or partly in such exchange and partly for cash, at which hearing all persons to whom it is proposed to issue securities in such exchange shall have the right to appear.

V.

Respondent herein, prior to the appointment of said Commissioner as conservator and liquidator thereof, had obligations on insurance policies issued and outstanding in excess of $600,000,000

442 insuring the lives and condition of health of approximately 200,000 or more persons, and also had accident and health policies outstanding insuring approximately an additional 75,000 persons; some or all of which said policies have been or will be assumed and reinsured by your intervener under the terms of said plan and agreement. Intervener is also informed and believes that said respondent corporation has approximately 2,800 stockholders. There is also
443 a large group of persons who have or may have claims of other nature against said respondent corporation and said Commissioner, as liquidator thereof, all or part of which have been or will be assumed by your intervener under the terms of said plan and agreement.

By reason of the number of such persons and the further fact that many of them are residents of states other than California, your intervener believes it is impracticable and impossible to make
444 personal service of notice of hearing upon an order to show cause upon all of said persons. The matters herein being of a common or general interest to said persons and separately to each group thereof, your intervener believes that one or more persons from each group should be personally served with notice of said hearing.

Wherefore, your intervener prays:

1. That this court grant to your intervener leave to intervene herein as a party plaintiff and to file herein this its said petition;

445 2. That this court issue its order to show cause, directed to all policyholders, stockholders and creditors of The Pacific Mutual Life Insurance Company of California to appear before this court upon a day to be set by said court to show cause, if any they have, why this court should not make its order (a) confirming and approving, and ratifying the permission given with respect to, said plan and agreement of rehabilitation, sale and transfer of assets and re-
446 insurance and the carrying out of the terms thereof, (b) confirming and approving the action of your intervener and said Commissioner in executing and delivering the agreement provided for under said plan, a copy of which agreement is attached hereto as Exhibit B, and the amended agreement, a copy of which is hereto attached as Exhibit D, and the carrying out of the terms thereof, (c) confirming and approving the execution and delivery of the deed and bill of sale
447 above mentioned, a copy of which is attached hereto as Exhibit C, and the action of said Commissioner in transferring to your intervener all of the assets of respondent corporation the title to which was vested in him as liquidator, except the stock of your intervener and except any and all rights or claims of whatsoever nature which respondent corporation or the liquidator, in his capacity as liquidator of respondent corporation, may have against any of the present or past officers, directors or employees, as such, of re-

spondent corporation, or against any other person, firm or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors or employees of respondent corporation, including rights or claims on any fidelity or surety bond or bonds given to or in favor of respondent corporation to secure the faithful performance by any of its officers, directors or employees of any of their duties as such, and (d) approving the terms and conditions upon which said plan and agreement proposes the issuance and exchange of securities, after a hearing upon the fairness of such terms and conditions, at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear;

3. That this court prescribe the time and manner of notice, and the persons or classes of persons to whom such notice shall be directed, upon said order to show cause, including, if the court be so advised, the determination of such representatives of the various groups of interested parties involved who shall be given such notice as representatives of such groups.

PACIFIC MUTUAL LIFE INSURANCE COMPANY.
By A. N. KEMP,
Its President,
Intervener.

ASA V. CALL,
O'MELVENY, TULLER & MYERS,
Attorneys for Intervener.

State of California, county of Los Angeles—ss.

A. N. Kemp, being first duly sworn, deposes and says: That he is the president of Pacific Mutual Life Insurance Company, a corporation, the intervener in the above entitled matter, and makes this verification for and on behalf of said corporation.

That affiant has read the foregoing petition for intervention and for order to show cause and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters he believes it to be true.

A. N. KEMP.

Subscribed and sworn to before me this 23rd day of July, 1936.

(Seal) E. W. MUHSFELD,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 27, 1940.

[For copy of Exhibit A attached hereto see copy of Rehabilitation, Sale, etc., heretofore printed.]

454 EXHIBIT B.

REHABILITATION, SALE AND TRANSFER OF ASSETS AND REINSURANCE AGREEMENT

Between

PACIFIC MUTUAL LIFE INSURANCE COMPANY

And

SAMUEL L. CARPENTER, JR.

As Insurance Commissioner of the State of California and as Liquidator of

455 THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

Dated July 22, 1936.

REHABILITATION, SALE AND TRANSFER OF ASSETS AND REINSURANCE AGREEMENT.

This Agreement, made and entered into this 22nd day of July, 1936, between Pacific Mutual Life Insurance Company, a California corpora-
456 tion, and Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, a California corporation,

Witnesseth:

Whereas, an order was entered in the Superior Court of the State of California in and for the County of Los Angeles on the 22nd day of July, 1936, in a proceeding entitled "Samuel L. Carpenter, Jr., Insurance Commissioner of the State

of California, Petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, Respondent," by which the court found that The Pacific Mutual Life Insurance Company of California was in such condition that its further transaction of business would be hazardous to its policyholders, creditors and to the public, and that said Company was insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1, of the Insurance Code of the State of California, and by which said order title to all of the assets of said Company, wheresoever situated, was vested in Samuel L. Carpenter, Jr., in his official capacity as Insurance Commissioner of the State of California, and by which order said Commissioner was directed forthwith to take possession of all of the books, records, property, real and personal, and assets of said Company and to conduct as conservator the business of said Company, and enjoining said Company and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until the further order of said court, and pursuant to said order said Commissioner has become vested with the title to and did take possession of all of the books, records, property, real and personal, and assets of said Company; and

Whereas, said Commissioner as conservator as aforesaid, did thereafter apply to said court for an order for the liquidation of said Company

460 and for an order directing the Commissioner to formulate and submit a plan and agreement of rehabilitation and reinsurance which, in the judgment of the Commissioner, would best preserve the value of the estate in liquidation, provide for the removal of the causes which made the proceeding necessary, and most fairly and equitably protect the rights and claims of all persons interested therein; and

Whereas, said court thereafter made and en-
461 tered an order for the liquidation of said Company, appointing the Commissioner as liquidator thereof, and as such vested with title to all of the assets of said Company, and directing the Commissioner to file such a plan; and

Whereas, said Commissioner submitted to said court a Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement, of which this agreement is a part, alleging that said plan and agreement will preserve the value of the
462 assets in liquidation, is fair and equitable to the policyholders, creditors and stockholders of said Company, and protects the legal rights of all interested parties as they now exist; and

Whereas, thereafter said court made and entered an order approving said plan and agreement, and finding that said plan and agreement is fair and equitable and protects the existing legal rights of the policyholders, creditors and stockholders of said Company, and directing that

463 the Commissioner proceed to consummate said plan and execute this agreement;

Now, Therefore, in consideration of the premises and of the respective undertakings of the parties hereto, It Is Hereby Agreed:

Definitions

1. The parties to this agreement and the persons mentioned herein will be referred to and certain terms used herein are hereby defined as

464 follows:

Samuel L. Carpenter, Jr., in his capacity as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and any successor Commissioner and liquidator, will be referred to as "Commissioner."

The Pacific Mutual Life Insurance Company of California will be referred to as the "Old Company."

465 Pacific Mutual Life Insurance Company will be referred to as the "New Company."

The Superior Court of the State of California in and for the County of Los Angeles will be referred to as the "Court."

The date and hour of entry of said order of liquidation, to wit, July 22, 1936, at one o'clock P. M. Pacific Standard Time, will be referred to as the "date of liquidation."

This agreement shall be deemed to have been executed and shall be effective as of the date

and hour of entry of said order of liquidation, and said date and hour will be referred to as the "effective date of this agreement."

The phrase "assets of the Old Company" or any similar phrase used in this agreement shall be deemed to mean all books, records, property, real and personal, tangible and intangible, and all other assets of every kind, character and description whatsoever, and wheresoever situated, owned by the Old Company at the time of the appointment of the Commissioner as conservator which shall not have been applied by him against his subscription for stock of the New Company or disposed of by him in the due course of his administration as conservator or in his administration as liquidator of the Old Company, plus all property acquired by the Commissioner in either of said capacities and the income therefrom collected by him, except (a) the stock of the New Company held by him, and (b) any and all rights or claims of whatsoever nature which the Old Company or the Commissioner, in his capacity as liquidator of the Old Company, may have against any of the present or past officers, directors or employees, as such, of the Old Company, or against any other person, firm or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors or employees of the Old Company, including rights or claims on any fidelity or surety bond or bonds given to or in favor of the Old

469 Company to secure the faithful performance by any of its officers, directors or employees of any of their duties as such.

Outstanding policies of the Old Company known as its Non-Cancelable Income Policies, including the Aggregate form thereof, will be referred to as "Non-Can Policies."

Transfer of Assets

2. The Commissioner shall grant, bargain, 470 sell, assign, convey, transfer, set over and deliver to the New Company the assets of the Old Company.

The Commissioner shall not be required to make manual delivery of any cash or securities deposited by the Old Company with any governmental authority as a condition to the conduct of its business, but shall only be required to assign his interest therein, subject to the terms of such deposit.

471 The Commissioner shall transfer and deliver to the New Company the full amount of all premiums paid to the Commissioner on any policy reinsured and assumed hereunder which have been paid in to the Commissioner on or after the date of liquidation, and the New Company shall credit the holder of such policy with the payment of such premiums accordingly, subject to repayment as hereinafter provided in the event the holder of such policy shall elect not to accept such reinsurance and assumption by the New

Company. The New Company shall repay to the Commissioner upon demand any premium received by the New Company hereunder from the Commissioner which was paid by or on behalf of the insured after the date of liquidation to the Commissioner, if the policyholder has filed or shall file a claim in accordance with the Commissioner's notice requiring the filing of claims in the above mentioned cause, and the court shall direct the Commissioner to return the premium so paid.

Subsequent to the effective date of this agreement and for such period of time as the Commissioner may determine, no investment or reinvestment of the assets of the Old Company transferred to the New Company pursuant to this agreement shall be made without first obtaining the written approval of the Commissioner. The Commissioner hereby agrees that said period shall in no event exceed six months from and after the effective date of this agreement.

Reinsurance and Assumption of Policies Other Than Non-Can Policies.

3. The New Company does hereby reinsure and assume, as of the date of liquidation, with the exception hereinafter provided, the liability of the Old Company under all life, endowment annuity and term policies and contracts of insurance, and all other policies and contracts of insurance, including, without limiting the same to,

health and accident benefits, waiver of premium disability benefits, permanent and total disability benefits, and all supplementary contracts, annuity contracts and all reinsurance contracts, issued or assumed by the Old Company and outstanding and in force on the books and records of the Old Company at the date of liquidation, subject, however, to any and all defenses, offsets, counterclaims, cross-complaints and rescission rights against said policies or contracts or against any claims and actions thereon, which would have been available to the Old Company had this agreement not been made; provided, however, that all outstanding Non-Can Policies are not reinsured or assumed under this paragraph and are hereby expressly excepted from the obligations of the New Company under this paragraph. The determination by the New Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so reinsured hereunder.

Reinstatement of Lapsed Policies

4. The New Company will reinstate any policies heretofore issued, assumed or reinsured by the Old Company, which are not excepted from the obligations of the New Company contained in the foregoing paragraph and which at the date of liquidation, by their terms, were entitled to reinstatement, provided that all requirements

478 necessary to procure a reinstatement of said policies under their terms are fulfilled to the satisfaction of the New Company.

The New Company will also reinstate, during the lifetime of the insured and provided the insured is not in such condition as to be eligible for benefits under the policy, without evidence of insurability, any of said policies, with the aforesaid exception, which have lapsed since the date
479 of liquidation, upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made and premiums are paid within sixty (60) days after the effective date of this agreement. Upon the reinstatement of such lapsed policy it shall, for all purposes, be treated the same as if it had been in force on the date of liquidation and be subject to the terms and conditions of this agree-
480 ment.

Payment of Policy Claims Other Than Claims on Non-Can Policies

5. The New Company will pay in full, in accordance with the terms and conditions of the policies or other contracts under which the claims shall have been or may be made, and whether or not the claims arose or matured prior or subsequent to the date of liquidation, all claims (ex-

cept claims on Non-Can Policies) including, without limiting the same to, claims for death benefits, matured endowments, annuity payments, permanent total disability and premium waiver benefits, accident and sickness benefits, payments under policy settlement agreements, policy dividends left at interest with the Old Company prior to the date of liquidation, and payments under all other matured contracts under which the proceeds of policies and contracts were left with the Old Company prior to the date of liquidation; subject, however, to any and all defenses, offsets, counter-claims, cross-complaints and rescission rights against any such claim or claims which would have been available to the Old Company had this agreement not been made.

Reinsurance and Assumption of Non-Can Policies

6. The New Company does hereby reinsure and assume, as of the date of liquidation, the liability of the Old Company under all Non-Can Policies issued by the Old Company and outstanding and in force on the books and records of the Old Company at the date of liquidation, subject, however, to the terms, conditions and limitations, and only to the extent hereinafter specifically provided and subject, further, to any

and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against such policies or any claims and actions thereon which would have been available to the Old Company had this agreement not been made. The determination by the New Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so reinsured hereunder.

Terms, Conditions, Limitations and Extent of Reinsurance and Assumption of Non-Can Policies

7. The obligation of the New Company with respect to the payment of monthly disability benefits on claims either filed or notice of which is filed with the New Company or any of its predecessors at any time after the date of liquidation under Non-Can Policies reinsured and assumed under the preceding paragraph, subject to restoration as provided in paragraph 8 hereof, shall be limited to payment of the following percentages of the monthly disability benefits originally provided under said policies, according to the following premium classes, respectively:

487 Premium Class of Policy	Percentage of Original Monthly Benefit Assumed By New Company
1918 Premium class Issued under Rate Books: A 1445, A 1445 Z, A 1445 Y, A 1445 X and A 1445 W. in period from: August, 1918—September, 1921	20%
488 1921 Premium class Issued under Rate Books: A 1687, A 1687 Z, A 1687 Y, A 1687 X, A 1687 W. in period from: September, 1921—July, 1926.	35%
1926 Premium class Issued under Rate Books: A 1958, A 1958 Z, A 1958 Y, in period from: 489 July, 1926—February, 1929.	45%
1929 Premium class Issued under Rate Books: A 2293 in period from: February, 1929—January, 1931	55%
1931 Premium class Issued under Rate Books: A 2367 in period from: January, 1931—March, 1932.	65%

490 1932 Premium class
Issued under Rate Books:
A 2432, A 2432 Z, A 2499 90%
in period from:
March, 1932—February, 1935.
Aggregate policy
Issued under Rate Books:
A 2499, A 2567 90%
in period from:
October, 1933—July, 1935.

491 Note: All of the above mentioned Rate Books are Rate Books issued by the Old Company and copies are on file at the office of the New Company at 523 West Sixth Street, Los Angeles, California, and in the offices of the Insurance Commissioners or similar public officials of each state in which the Old Company has been transacting insurance business.

492 Notwithstanding the foregoing limitation on the obligation of the New Company to make monthly disability payments on such policies, there shall be no change or reduction in the original premium rates on such policies, and to be entitled to the reinsurance and assumption of his Non-Can Policy by the New Company as aforesaid, the policyholder shall be obligated to continue to make premium payments at the rate originally provided in his policy.

493 Restoration of Non-Can Benefits

8. The New Company shall be obligated to restore the monthly disability benefits originally provided in the Non-Can Policies reinsured and assumed under this agreement by applying, and only by applying, to such extent and in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance Commissioner of the State of California as hereinafter provided, sums equivalent to the fol-
494 lowing:

(a) The net profits derived by the New Company from that portion of the business of its accident and health department represented by accident and health policies reinsured and assumed under this agreement, including all Non-Can Policies so reinsured and assumed hereunder; and

(b) The net profits derived by the New Company from that portion of the business of the
495 nonparticipating branch of its life department represented by nonparticipating life insurance policies reinsured and assumed hereunder.

As of December 31, 1938, and tri-annually thereafter or at the time of the regular examination of the New Company by the Insurance Commissioner of the State of California, the New Company shall render to such Commissioner an accounting of the net profits, if any, arising from the sources referred to in (a) and (b)

above, including the New Company's proposal as to the extent and manner of the application of sums equivalent to such net profits to the restoration of benefits on said Non-Can Policies. Any such proposal may include provision for proportionate restoration of commissions to agents, who through accepting the assumption of their contracts on the basis hereinafter provided, have received less commissions on such policies than they otherwise would have received. After the approval of any such proposal by said Commissioner with such changes as he may require therein, the New Company shall proceed to put said proposal into effect. The extent and manner of the restoration, as provided in any such proposal so approved by said Commissioner, shall be binding upon all holders of said Non-Can Policies and other persons interested therein.

The holders of any such Non-Can Policies surrendered to the New Company in connection with any settlement thereunder shall not be entitled thereafter to any of the benefits of such restoration.

The holders of any such Non-Can Policies which shall have lapsed after the date of liquidation and which shall not have been reinstated either in accordance with their terms or in accordance with the provisions of this agreement, shall not be entitled thereafter to any of the benefits of such restoration.

499 Reinstatement of Lapsed Non-Can Policies

9. The provisions of paragraph 4 of this agreement with respect to reinstatement of lapsed policies shall apply to Non-Can Policies, subject to the terms, conditions and limitations contained in paragraphs 6 and 7 hereof.

Payment of Claims on Non-Can Policies Filed Prior to Date of Liquidation

10. The New Company shall be obligated to
500 continue the payment of all disability benefits under Non-Can Policies, claims or notices of claims for which had been filed with the Old Company prior to the date of liquidation, and all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to any such settlement agreements; and subject,
501 further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company had this agreement not been made.

Moratorium

11. The reinsurance and assumption of obligations by the New Company herein provided for are subject to the condition that the New Company shall not be required, prior to sixty (60) days, and such additional period as may be

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determined by the Commissioner, from and after the effective date of this agreement, to make policy loans (except for the purpose of paying premiums on the same policy or on additional policies issued on the same life), or to pay cash surrender values. This provision, however, shall not apply to any increase in values that are accumulated from premium payments or loan repayments which are received subsequent to the date of liquidation.

During such period as the moratorium is in effect the cash surrender option of all policies of the Old Company may be considered as nonexisting, except as provided above, and all policyholders who do not pay their premiums and who are entitled to a guaranteed value will be restricted to the automatic nonforfeiture value (properly adjusted for any policy indebtedness and accrued interest thereon) under the policy. At the discretion of the New Company, however, the cash surrender value under any policy, properly adjusted for any policy indebtedness and accrued interest thereon, may be allowed whenever it appears, in the sole judgment of the New Company, that the granting of such surrender value will be to the advantage and benefit of the Old Company policyholders as a class.

Assumption of Claims Against Old Company

12. The New Company hereby assumes and agrees to pay the following:

505 (a) All costs and expenses of the Commissioner in his capacities as conservator or liquidator of the Old Company, including attorneys' fees, as finally approved by the court;

(b) All unpaid taxes legally due the United States, the State of California, and other States, and Counties and Municipalities thereof, in connection with the business and assets of the Old Company, and remaining unpaid;

(c) Wages and salaries legally due to per-
506 sons employed by the Old Company for services rendered and current bills for office supplies and incidental expenses in connection with the operation of the business of the Old Company and remaining unpaid;

(d) All claims against the Old Company filed with the Commissioner as liquidator, and finally allowed by the Commissioner and/or by the Court.

The obligation of the New Company with re-
507 spect to items (a), (b), (c) and (d) above shall be to pay the same, in the order of preference established by law, and shall be limited, in the aggregate, to an amount equal to the value of the assets of the Old Company transferred to the New Company pursuant to this agreement, on the basis of valuation provided in paragraph 13 of this agreement, less the amount of the reserves established by the New Company, with the approval or in accordance with the requirements of

the Commissioner, with respect to policies of the Old Company reinsured and assumed by the New Company hereunder, and with respect to policy claims assumed by the New Company hereunder.

Valuation of Assets Transferred to New Company

13. The assets of the Old Company transferred to the New Company pursuant to this agreement shall be valued at the amounts established therefor in the so-called "Convention Report" made in 1936 by the Commissioner and similar officials of certain other states in which the Old Company did business, with respect to the condition of the Old Company, as of December 31, 1935.

Agents

14. The New Company hereby assumes, subject to the limitation and exception hereinafter stated, any obligations under any contract heretofore made by the Old Company with any agent (regardless of classification), manager, or supervisor, it being recognized that the services of the agents who produced, or under his direction or supervision was produced, the business reinsured or assumed hereunder in servicing said business, and the maintaining of same in force as to the ultimate interest and advantage of the policyholders of the Old Company. However, the obligations of the Old Company to pay commissions on Non-Can Policies reinsured and as-

511 sumed by the New Company, with the limitations as to disability benefits hereinbefore provided, shall be reduced as follows: (a) No commissions due after the date of Liquidation shall be paid on Non-Can Policies on all forms issued prior to and including Forms A291 to A294, both inclusive, and commissions due after the date of liquidation on all Non-Can Policies issued on all other forms, the holders of which accept and reinsure their assumption by the New Com-
512 pany on the reduced basis hereinbefore provided, shall be reduced in proportion to the reduction in disability benefits to the insured under such policies. The New Company shall not assume or be bound by any agreement which the Old Company may have made with agents with respect to payment of commissions on policies after lapsation. To such extent, in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance
513 Commissioner of the State of California, as provided in paragraph 8 of this agreement, the New Company shall apply its net profits derived from the sources referred to in (a) and (b) of said paragraph 8 to the restoration to agents of the amounts of the reduction in their commissions on policies referred to in (b) of this paragraph to which said agents would have otherwise been entitled.

514 Additional Payments on Allowed Claims and Payments to Stockholders of Old Company

15. For a period of ten (10) years commencing January 1, 1937, the New Company shall pay to the Commissioner for the benefit of holders of claims filed with the Commissioner and finally allowed by him or by the court, until such claims shall have been paid in full, and thereafter for the benefit of and distribution to the stockholders of the Old Company, the net profits of the New
515 Company derived from the sources referred to in (a) and (b) of paragraph 8 of this agreement remaining after:

(a) The holders of Non-Can Policies referred to in said paragraph 8 shall have been restored to the full benefits originally stated in their policies as provided in said paragraph; and

(b) The New Company shall have established such reserves as may be deemed necessary by the New Company and the Commissioner for proper
516 depreciation of the assets allocated to, or held by, the New Company for the benefit of the departments referred to in (a) and (b) of said paragraph 8; and

(c) Restoring to surplus allocated to the participating life department of the New Company the sum of $1,792,118.97, or its equivalent, together with interest thereon to date of restoration at the average rate earned by the New Company during such period on its invested assets; and

517 (d) Creating a reserve or adding to the surplus of the New Company an amount equal to the amount of policy reserve for Non-Can Policies released by reason of lapsation of such policies reinsured and assumed hereunder in excess of a lapse rate of ten per cent (10%) per year, or occasioned by substitutions or exchanges of such policies for other types of accident or health insurance.

At the end of said ten (10) year period, to
518 wit, on January 1, 1947, the New Company shall create a fund equal to $10 per $1000 of non-participating life insurance reinsured and assumed by the New Company under this agreement and then remaining in force, which fund shall be applied, first, to the extent necessary to complete the restoration of holders of Non-Can Policies reinsured and assumed by the New Company hereunder to the benefits originally provided in their policies in such manner and
519 to such extent as may be approved by the Commissioner and subject to the other limitations prescribed in paragraph 8 of this agreement, and, second, to the Commissioner for the benefit of claims filed with the Commissioner and finally allowed, and thereafter for the benefit of and distribution to the stockholders of the Old Company.

In lieu of creating said fund on January 1, 1947, as aforesaid, the New Company may at its option, apply to the aforesaid purposes a sum

equal to interest at the rate of six per cent (6%) per annum on an amount equal to said fund computed as aforesaid, until such time as the New Company may elect to create the principal of said fund and apply the same as aforesaid. If the New Company shall elect on January 1, 1947, to pay and apply a sum equal to interest on said fund as aforesaid, then such payment shall be applied in the same manner as, and shall be deemed to be in lieu of the application of the Old Company's net profits as provided in paragraph 8 of this agreement and the Old Company's obligations with respect to application of said net profits as provided under said paragraph 8 shall terminate.

Any such payments to stockholders of the Old Company, in accordance with the foregoing, shall either be made pro rata to such stockholders, as their interests may appear according to the stock ledgers of the Old Company, or the New Company may issue to the Commissioner or to such stockholders appropriate certificates of the New Company evidencing its obligation to make such payments. Such certificates of interest may either be issued by the New Company to the Commissioner for distribution by him to stockholders of the Old Company in exchange for their stock certificates, or, at the election of the New Company, may be issued by the New Company directly to such stockholders upon the surrender of their stock certificates.

523 Mutualization of New Company

16. The New Company hereby consents to such plan for its voluntary mutualization in accordance with the laws of the State of California as now in effect or hereafter amended, as may be proposed by the Commissioner, as soon as legally possible; and the Commissioner agrees to propose such mutualization plan, as the holder of the stock of the New Company. Such mutualization plan shall contain such terms and
524 provisions, not inconsistent with this agreement, as may be required by law or approved by the Commissioner and the New Company. The purchase price paid by the New Company for the acquisition of its outstanding stock pursuant to such mutualization plan to the extent not required by the Commissioner as the holder of said stock for the satisfaction of claims against the Old Company, filed with the Commissioner and finally allowed, shall be repaid by the Com-
525 missioner to the New Company.

Notice

17. The New Company shall mail promptly to the insured named in all policies and supplementary contracts of the Old Company in force at the date of liquidation, and any assignees thereof of record, a printed copy of the Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan concerning the Old Company, including a copy of this agreement as executed, to which the New Company may attach its cer-

526 tificate of reinsurance and assumption, inserted in an envelope, first class postage prepaid, addressed to the name and address of each of the persons aforesaid last shown upon the records of the Old Company. By "assignees of record" is meant assignees appearing upon the records of the Old Company at its Home Office.

Election of Policyholders and Claimants and Effect Thereof

18. Each policyholder and policy claimant
527 of the Old Company may elect either to accept the reinsurance and assumption of his policy or contract and/or any claim thereunder by the New Company, as provided in this agreement, or to file his claim against the Old Company with the Commissioner, in the manner provided by the Insurance Code of the State of California with respect to the filing of claims against an insurer in the process of liquidation. Persons so filing claims, who shall not withdraw them as herein-
528 after provided, are herein referred to as dissenting policyholders. The filing of a claim by any dissenting policyholder shall remove the policy or contract in respect of which said claim shall be filed, and the claim of persons under such policy or contract from the benefit of the provisions of this agreement with respect to reinsurance and/or assumption, and shall constitute an irrevocable election, on the part of such policy or contract holder, and his beneficiary and all persons claiming under him, not to accept the benefit of such reinsurance and/or assumption

529 provisions unless such claim shall be withdrawn by the claimant at any time prior to the expiration of sixty (60) days from and after the date of the expiration of the time for filing claims, as provided by law, with the written consent of the New Company, in which event such policy or contract, and the persons interested in the benefits thereunder, shall be entitled to the benefit of such reinsurance and/or assumption provisions and shall be bound by this agreement.

530 Every person entitled to accept any benefit under this agreement, who shall have indicated his election so to do either by not filing any such claim, or by withdrawing such claim if filed, shall be considered as assigning to the New Company all his claims against the Old Company, and the benefits of any rights, securities, liens, or preferences to which he may be entitled by reason of his claims and also as so assigning all interest to which his claims may entitle him in all of the
531 assets of the Old Company, whether located in California or elsewhere. The New Company shall be entitled to assert and prosecute its claims, securities, liens or preferences of all holders of policies or contracts, issued or assumed by the Old Company, who so assent to or become bound by the provisions of this agreement, and the New Company shall be entitled to assert and obtain in such manner as it may deem best, any rights, securities, liens, or preferences to which the holders of policies or contracts issued or assumed by the Old Company, who shall so assent

532 to or become bound by the provisions of this agreement, would have had.

Each holder of any policy or contract issued or assumed by the Old Company, who shall not have filed his claim against the Old Company with the Commissioner in the manner and within the period required by law, shall be deemed ipso facto to have assented to and become bound by the provisions of this agreement, and entitled to the benefits hereof, subject to all of its terms.

533 No holder of any such policy or contract of the Old Company who shall be deemed to have assented to or become bound by the provisions of this agreement shall have any rights, securities, liens, or preferences not accorded by this agreement.

Right of the New Company to Prosecute and Defend Claims

19. All claims or demands against the Old Company or its property now the subject of liti-

534 gation in any court of competent jurisdiction in actions against the Old Company, and any and all claims and demands against the Old Company or its property filed with the Commissioner as liquidator, may be prosecuted and defended until final judgment, and the New Company shall have the right to assist and join in such defense through counsel selected and paid by the New Company, and with all defenses, offsets, counterclaims, cross-complaints and rescission rights that might or could have been available to it, the Old

535 Company, or to the Commissioner as liquidator, including all rights of appeal or review in whatsoever form.

Right of New Company to Settle or Pay Claims Against Old Company

20. In order that claims against the Old Company may be disposed of as speedily and economically as possible, the New Company shall have the right, with the approval of the Commissioner, to settle, compromise or compound
536 any claim or demand against the Old Company or its property, whether or not such claim or demand shall have been filed with the Commissioner and to pay in discharge thereof such amount as may be mutually agreed upon, and if such claim or demand shall not have been so filed, with like force and effect as if such claim or demand had been duly filed with the Commissioner and finally allowed as above set forth; provided, that no such settlement, compromise
537 or compounding shall affect the right of the New Company to contest and litigate any other claims or demands of similar character.

Withholding of Assets

21. In the event of the institution of primary receivership or other proceedings in any of the states other than the State of California, wherein the Old Company has assets and in which proceedings the assets located in any such state are liquidated and distributed exclusively to policyholders, creditors, stockholders or other persons

538 resident of said state, such policyholders, creditors, stockholders and other persons interested in assets of the Old Company, who accept in any such proceeding their pro rata share of the distribution of the assets of the Old Company located in said state, shall not be entitled to the benefits provided in this agreement.

Interpretation of Agreement and Accountings Thereunder

22. In the event of any dispute between the
539 New Company and any person entitled to or who has elected to accept the benefits of this agreement, the determination by the Commissioner as to the interpretation of this agreement shall be conclusive and binding upon both parties to any such dispute. The accounting methods or procedure of the New Company in computing any net profits, earnings or other amounts under this agreement and the amount and character of any and all reserves which may be established by
540 the New Company under this agreement or in the course of its operations following the execution of this agreement, shall be subject to the approval of the Commissioner, and all such accounting matters and computations and amounts and characters of reserves when so approved by the Commissioner shall be conclusive and binding upon the New Company and all persons entitled to any benefit under this agreement, including, but not limited to, persons who may have elected to file their claims with the Commissioner as liquidator.

541 Commissioner Not Personally Liable

23. The Commissioner is bound by the provisions of this agreement only in his capacity as such Commissioner and as conservator or liquidator of the Old Company. All undertakings and obligations herein set forth as undertakings or obligations of the Commissioner are made by the Commissioner only in his said capacities and to such extent as he had authority to make the same, and the Commissioner makes no warranty
542 of his authority to make the same. No personal liability on the part of the Commissioner is assumed under this agreement.

Liabilities of New Company Limited by This Agreement

24. It is understood that the New Company does not assume any liability to any stockholders of the Old Company in any way arising out of or by virtue of their stock holdings in the Old Company, nor any liability of any character or
543 description to creditors of the Old Company, whether policyholder creditors or others, except as and to the extent provided in this agreement; it being specifically understood that the New Company does not assume any liability of any character or description whatsoever of the Old Company except as and to the extent in this agreement expressly provided, and the provisions of this agreement shall be a complete and adequate defense by the New Company to any action, other than an action to enforce the express provisions of this agreement, which may be brought

544 by such stockholders or creditors above mentioned.

Amendments

25. This agreement may be amended at any time while the Commissioner remains liquidator of the Old Company, by the consent of the Commissioner and the New Company, subject to the approval of the court.

Assignability of Agreement

26. This agreement and all rights, duties and
545 obligations hereunder, shall inure to the benefit of and be binding upon the respective parties hereto, their several successors and assigns.

In Witness Whereof, the New Company has caused this agreement to be executed by its president or vice president, attested by its secretary, and its corporate seal to be hereunto affixed, and the Commissioner has executed this agreement, the day and year first above written.

PACIFIC MUTUAL LIFE IN-
546 SURANCE COMPANY,
By A. N. KEMP,
Its President
Attest: T. RUSSELL HARRIMAN, JR.,
[Seal] Its Secretary
"New Company"

SAMUEL L. CARPENTER, JR.,
As Insurance Commissioner of the State of California and liquidator of The Pacific Mutual Life Insurance Company of California.
"Commissioner"

547 EXHIBIT C.

Deed and Bill of Sale

This Indenture, dated this 22nd day of July, 1936, by and between Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, (hereinafter called the "liquidator") not personally but as liquidator of The Pacific Mutual Life Insurance Company of California, a California corporation, party of the first part,
548 The Pacific Mutual Life Insurance Company of California, a California corporation (hereinafter called the "Old Company"), party of the second part, and Pacific Mutual Life Insurance Company, a California corporation (hereinafter called the "New Company") party of the third part,

Whereas, on or about the 22nd day of July, 1936, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, commenced
549 a proceeding in the Superior Court of the State of California, in and for the County of Los Angeles, being entitled therein "Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, Respondent," being numbered No. 404673 in the files of said court, by making an application to be appointed conservator of said Old Company pursuant to Section 1011 of the Insurance Code of said state, and subsequently

and on said date said Samuel L. Carpenter, Jr., as Insura ce Commissioner of the State of California, by order duly made in said proceeding, was duly appointed conservator of the business, assets and property of Old Company, and there was vested in said Samuel L. Carpenter, Jr., as such conservator, title to all the assets of said Old Company, wheresoever situated; and

Whereas, subsequently and on the same date, said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, then acting as conservator of the business and assets of Old Company, made a verified application in said proceeding pursuant to Section 1016 of the Insurance Code of the State of California, to the said Superior Court, and was by said court on said date duly appointed liquidator of said Old Company and ordered and directed to liquidate and wind up the business of said Old Company, and the title to all property and assets of said Old Company was continued in said Samuel L. Carpenter, Jr., as liquidator; and

Whereas, thereafter and upon the same date, said liquidator presented to said court a proposed plan and agreement of rehabilitation, sale and transfer of assets and reinsurance of the business and affairs of Old Company, which said plan and agreement was duly approved and permitted by said court by its order made and entered on said 22nd day of July, 1936, and said liquidator and

553 New Company were ordered to carry out the terms of said plan and agreement; and

Whereas, by the terms of said plan and agreement it is provided that upon the execution of that certain agreement contained in said plan by liquidator and New Company, and in consideration of such execution by said New Company, liquidator shall assign, transfer and set over to said New Company all of the assets then in his hands as liquidator, and formerly belonging to
554 Old Company, with certain exceptions more fully set forth therein; and

Whereas, the order of said court approving said plan did specifically order the liquidator to forthwith transfer and set over unto said New Company upon the execution of said agreement said assets, and did specifically order the officers, directors, agents and employees of said Old Company to execute such documents of transfer and conveyance as might be requested of them, or
555 otherwise, and do such acts in connection therewith as might be requested of them by liquidator; and

Whereas, liquidator and New Company have duly executed said agreement as required by said plan and as ordered and directed by the order of said court:

Now, Therefore, This Indenture Witnesseth:

That said Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, not

556 personally but as liquidator of the business and affairs of The Pacific Mutual Life Insurance Company of California, party of the first part, for himself, and said The Pacific Mutual Life Insurance Company of California, party of the second part, for itself, in order to carry into effect said orders of said Superior Court of the State of California in and for the County of Los Angeles, and the provisions of the plan and agreement of rehabilitation, sale and transfer of
557 assets and reinsurance approved, permitted and authorized by said court, in consideration of the premises and the sum of ten dollars ($10.00) lawful money of the United States to them paid, receipt of which is hereby acknowledged, and other good and valuable consideration, have granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents do grant, bargain, sell, alien, remise, release, convey, con-
558 firm, assign, transfer and set over unto Pacific Mutual Life Insurance Company, a corporation, the grantee, party of the third part, its successors and assigns, all assets and property and interests in assets and property of every kind, character and description held or owned by said Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, not personally but as liquidator of the business and affairs of The Pacific Mutual Life Insurance Company of California, and held or owned by said The Pacific

559 Mutual Life Insurance Company of California, a corporation, vested and contingent, in law or in equity, tangible and intangible, real, personal or mixed, and wheresoever situate, and all assets, interests, property of every kind, character and description, vested and contingent, in law and in equity, tangible and intangible, real, personal or mixed, held or which might be held by said party of the first part or party of the second part, and to which either of said parties are or may be-
560 come entitled, including, without limiting the generality of the foregoing description, all real property and interest therein, tangible and intangible personal property, merchandise and supplies, furniture, fixtures, equipment, cash on hand and in bank and in transit, stocks, bonds and other securities, choses in action, claims, suits, causes of action, demands, set-offs and counter-claims, notes and accounts receivable owing to Old Company and/or liquidator, together
561 with all security therefor, all collateral and security deposits made by Old Company and/or liquidator, and all collateral and security deposits made by any person, firm or corporation with Old Company and/or liquidator and held by them, or either of them, on this date, contract rights and interests, rights of subrogation and priority, licenses, policies of insurance and reinsurance and claims thereunder, prepaid insurance and other prepaid expenses, franchises, trade names, trademarks, patents and copyrights, good will, the ex-

562 clusive right to the extent possessed by Old Company and/or liquidator to use the name "The Pacific Mutual Life Insurance Company of California" or "Pacific Life Insurance Company", and all books, records and papers pertaining to the business and affairs of Old Company and/or liquidator;

Saving and excepting herefrom, however, the following described property:

(1) All of the capital stock of New Company
563 now owned and held by liquidator; and (2) any and all rights or claims of whatsoever nature which the Old Company or the liquidator, in his capacity as liquidator of the Old Company, may have against any of the present or past officers, directors or employees, as such, of the Old Company, or against any other person, firm or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors or employees of the Old Company,
564 including rights or claims on any fidelity or surety bond or bonds given to or in favor of the Old Company to secure the faithful performance by any of its officers, directors or employees of any of their duties as such.

To Have and to Hold, possess and enjoy all and singular the above mentioned real and personal property, rights, franchises, privileges and immunities thereto appertaining, hereby conveyed or intended so to be, unto Pacific Mutual Life

565 Insurance Company, a corporation, as grantee, its successors and assigns, and to its and their own proper use, benefit and behoof hereunder, free from any charge or claim other than those undertaken and assumed by New Company by reason of its agreement heretofore executed, as hereinabove described, or such other charges or claims as may be imposed upon said New Company by the order of a court of competent jurisdiction in the premises.

566 Subject, However, in so far as any of the property by this indenture conveyed, assigned or transferred is covered by the lien thereof, to the lien of taxes or assessments lawfully levied or assessed against the same, and to all other liens, legal or equitable, superior at the time of said sale to the title of said Old Company and/or said liquidator, and subject to all conditions, restrictions, reservations, easements and rights-of-way of record.

567 This conveyance is made without any warranty of title or interest whatsoever and is and shall be deemed to be a conveyance only of such right, title and interest in and to all of said property as is or shall be owned or held by said liquidator and/or said Old Company.

Liquidator shall not incur any personal liability by reason of the execution of this indenture or by reason of any recital or covenant herein contained.

568 In Witness Whereof, first party has hereunto set his hand and seal, and second and third parties have caused their corporate names to be attached by their officers thereunto duly authorized, this 22nd day of July, 1936.

SAMUEL L. CARPENTER, JR.
not personally but as liquidator of The Pacific Mutual Life Insurance Company of California,
Party of the First Part.

569 THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA
By D. C. MacEwen
Vice President
By Elmer C. Potter
Assistant Secretary
(Old Company)
Party of the Second Part.

(Seal)

570 PACIFIC MUTUAL LIFE INSURANCE COMPANY
By A. N. Kemp
President
By T. Russell Harriman, Jr.
Secretary
(New Company)
Party of the Third Part.

(Seal)

571 State of California County of Los Angeles ss.

On this 22nd day of July, 1936, before me, E. W. Muhsfeld, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Samuel L. Carpenter, Jr., known to me to be the person whose name is subscribed to the foregoing Deed and Bill of Sale and acknowledged to me that he executed the same.

572 Witness my hand and official seal.

(Seal) E. W. MUHSFELD

Notary Public in and for said County and State.

My Commission Expires June 27, 1940

State of California County of Los Angeles ss.

On this 22nd day of July, 1936, before me, E. W. Muhsfeld, a Notary Public in and for said

573 County and State, residing therein, duly commissioned and sworn, personally appeared D. C. MacEwen, known to me to be the Vice President, and Elmer C. Potter, known to me to be the Ass't Secretary of The Pacific Mutual Life Insurance Company of California, one of the corporations which executed the foregoing Deed and Bill of Sale, known to me to be the persons who executed said Deed and Bill of Sale on

574 behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

(Seal) E. W. MUHSFELD

Notary Public in and for said County and State.

My Commission Expires June 27, 1940

State of California County of Los Angeles ss.

575 On this 22nd day of July, 1936, before me, E. W. Muhsfeld, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared A. N. Kemp, known to me to be the President, and T. Russell Harriman, Jr., known to me to be the Secretary of Pacific Mutual Life Insurance Company, one of the corporations which executed the foregoing Deed and Bill of Sale, known to

576 me to be the persons who executed said Deed and Bill of Sale on behalf of the corporation herein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

(Seal) E. W. MUHSFELD

Notary Public in and for said County and State.

My Commission Expires June 27, 1940

577 EXHIBIT D

REHABILITATION, SALE AND TRANSFER OF ASSETS AND REINSURANCE AGREEMENT

Between

PACIFIC MUTUAL LIFE INSURANCE COMPANY

And

SAMUEL L. CARPENTER, JR.

As Insurance Commissioner of the State of California and as Liquidator of

578 THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

Dated July 22, 1936.
As Amended July 23, 1936

Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement.

This Agreement, made and entered into this 23rd day of July, 1936, between Pacific Mutual
579 Life Insurance Company, a California corporation, and Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, a California corporation,

Witnesseth:

Whereas, an order was entered in the Superior Court of the State of California in and for the County of Los Angeles on the 22nd day of July, 1936, in a proceeding entitled "Samuel L. Car-

penter, Jr., Insurance Commissioner of the State of California, Petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, Respondent," by which the court found that The Pacific Mutual Life Insurance Company of California was in such condition that its further transaction of business would be hazardous to its policyholders, creditors and to the public, and that said Company was insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1, of the Insurance Code of the State of California, and by which said order title to all of the assets of said Company, wheresoever situated, was vested in Samuel L. Carpenter, Jr. in his official capacity as Insurance Commissioner of the State of California, and by which order said Commissioner was directed forthwith to take possession of all of the books, records, property, real and personal, and assets of said Company and to conduct as conservator the business of said Company, and enjoining said Company and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until the further order of said court, and pursuant to said order said Commissioner has become vested with the title to and did take possession of all of the books, records, property, real and personal, and assets of said Company; and

Whereas, said Commissioner as conservator as aforesaid, did thereafter apply to said court for

583 an order for the liquidation of said Company and for an order directing the Commissioner to formulate and submit a plan and agreement of rehabilitation and reinsurance which, in the judgment of the Commissioner, would best preserve the value of the estate in liquidation, provide for the removal of the causes which made the proceeding necessary, and most fairly and equitably protect the rights and claims of all persons interested therein; and

584 Whereas, said court thereafter made and entered an order for the liquidation of said Company, appointing the Commissioner as liquidator thereof, and as such vested with title to all of the assets of said Company, and directing the Commissioner to file such a plan; and

Whereas, said Commissioner submitted to said court a Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement, alleging that said plan and agreement will pre-
585 serve the value of the assets in liquidation, is fair and equitable to the policyholders, creditors and stockholders of said Company, and protects the legal rights of all interested parties as they now exist; and

Whereas, thereafter said court made and entered an order approving said plan and agreement, and finding that said plan and agreement is fair and equitable and protects the existing legal rights of the policyholders, creditors and

586 stockholders of said Company, and directing that the Commissioner proceed to consummate said plan and execute this agreement;

Whereas, pursuant to said order last mentioned, Pacific Mutual Life Insurance Company and Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, made and entered into on July 22, 1936, a Rehabilitation Sale and Transfer
587 of Assets and Reinsurance Agreement (hereinafter referred to as the original agreement), and

Whereas said original agreement provided in Paragraph 25 thereof that the same might be amended at any time while the Commissioner remains liquidator of The Pacific Mutual Life Insurance Company of California, by the consent of said Commissioner and of Pacific Mutual Life Insurance Company, subject to the approval of the court, and
588

Whereas said Commissioner remains liquidator of The Pacific Mutual Life Insurance Company of California and said Commissioner did on July 23, 1936, propose that Paragraph 15 of the original agreement be amended in certain respects and filed his petition with the court for the approval of such proposed amendment and for the approval of the execution of this agreement to provide for said amendment, and

589 Whereas Pacific Mutual Life Insurance Company has consented to said proposed amendment and the court has made its order under date of July 23, 1936, approving said amendment and the execution of this agreement;

Now, Therefore, in consideration of the premises and of the respective undertakings of the parties hereto, it is hereby agreed that the above mentioned original agreement executed under date of July 22, 1936, shall be, and the same
590 hereby is, amended so that Paragraphs 1 to 26, both inclusive, of said original agreement shall read in words and figures as hereinafter set out in Paragraphs 1 to 26, both inclusive, of this agreement, to-wit:

~~Now, Therefore, in consideration of the premises and of the respective undertakings of the parties hereto, It Is Hereby Agreed:~~ [D. L. E., J.]

591 Definitions

1. The parties to this agreement and the persons mentioned herein will be referred to and certain terms used herein are hereby defined as follows:

Samuel L. Carpenter, Jr., in his capacity as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and any successor Commissioner and liquidator, will be referred to as "Commissioner."

592 The Pacific Mutual Life Insurance Company of California will be referred to as the "Old Company."

Pacific Mutual Life Insurance Company will be referred to as the "New Company."

The Superior Court of the State of California in and for the County of Los Angeles will be referred to as the "Court."

The date and hour of entry of said order of liquidation, to wit, July 22, 1936, at one o'clock
593 P. M. Pacific Standard Time, will be referred to as the "date of liquidation."

This agreement shall be deemed to have been executed and shall be effective as of the date and hour of entry of said order of liquidation, and said date and hour will be referred to as the "effective date of this agreement."

The phrase "assets of the Old Company" or any similar phrase used in this agreement shall
594 be deemed to mean all books, records, property, real and personal, tangible and intangible, and all other assets of every kind, character and description whatsoever, and wheresoever situated, owned by the Old Company at the time of the appointment of the Commissioner as conservator which shall not have been applied by him against his subscription for stock of the New Company or disposed of by him in the due course of his administration as conservator or in his administration as liquidator of the Old Company, plus all

595 property acquired by the Commissioner in either of said capacities and the income therefrom collected by him, except (a) the stock of the New Company held by him, and (b) any and all rights or claims of whatsoever nature which the Old Company or the Commissioner, in his capacity as liquidator of the Old Company, may have against any of the present or past officers, directors or employees, as such, of the Old Company, or against any other person, firm or corporation, 596 by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors or employees of the Old Company, including rights or claims on any fidelity or surety bond or bonds given to or in favor of the Old Company to secure the faithful performance by any of its officers, directors or employees of any of their duties as such.

Outstanding policies of the Old Company known as its Non-Cancelable Income Policies, 597 including the Aggregate form thereof, will be referred to as "Non-Can Policies."

Transfer of Assets

2. The Commissioner shall grant, bargain, sell, assign, convey, transfer, set over and deliver to the New Company the assets of the Old Company.

The Commissioner shall not be required to make manual delivery of any cash or securities deposited by the Old Company with any govern-

598 mental authority as a condition to the conduct of its business, but shall only be required to assign his interest therein, subject to the terms of such deposit.

The Commissioner shall transfer and deliver to the New Company the full amount of all premiums paid to the Commissioner on any policy reinsured and assumed hereunder which have been paid in to the Commissioner on or after the date of liquidation, and the New Company 599 shall credit the holder of such policy with the payment of such premiums accordingly, subject to repayment as hereinafter provided in the event the holder of such policy shall elect not to accept such reinsurance and assumption by the New Company. The New Company shall repay to the Commissioner upon demand any premium received by the New Company hereunder from the Commissioner which was paid by or on behalf of the insured after the date of liquidation 600 to the Commissioner, if the policyholder has filed or shall file a claim in accordance with the Commissioner's notice requiring the filing of claims in the above mentioned cause, and the court shall direct the Commissioner to return the premium so paid.

Subsequent to the effective date of this agreement and for such period of time as the Commissioner may determine, no investment or reinvestment of the assets of the Old Company trans-

601 ferred to the New Company pursuant to this agreement shall be made without first obtaining the written approval of the Commissioner. The Commissioner hereby agrees that said period shall in no event exceed six months from and after the effective date of this agreement.

Reinsurance and Assumption of Policies Other Than Non-Can Policies

3. The New Company does hereby reinsure and assume, as of the date of liquidation, with
602 the exception hereinafter provided, the liability of the Old Company under all life, endowment annuity and term policies and contracts of insurance, and all other policies and contracts of insurance, including, without limiting the same to, health and accident benefits, waiver of premium disability benefits, permanent and total disability benefits, and all supplementary contracts, annuity contracts and all reinsurance con-
603 tracts, issued or assumed by the Old Company and outstanding and in force on the books and records of the Old Company at the date of liquidation, subject, however, to any and all defenses, offsets, counterclaims, cross-complaints and rescission rights against said policies or contracts or against any claims and actions thereon, which would have been available to the Old Company had this agreement not been made: provided, however, that all outstanding Non-Can Policies are not reinsured or assumed under this para-

graph and are hereby expressly excepted from the obligations of the New Company under this paragraph. The determination by the New Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so reinsured hereunder.

Reinstatement of Lapsed Policies

4. The New Company will reinstate any policies heretofore issued, assumed or reinsured by the Old Company, which are not excepted from the obligations of the New Company contained in the foregoing paragraph and which at the date of liquidation, by their terms, were entitled to reinstatement, provided that all requirements necessary to procure a reinstatement of said policies under their terms are fulfilled to the satisfaction of the New Company.

The New Company will also reinstate, during the lifetime of the insured and provided the insured is not in such condition as to be eligible for benefits under the policy, without evidence of insurability, any of said policies, with the aforesaid exception, which have lapsed since the date of liquidation, upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made and premiums are paid within sixty (60) days after the effective date of this agreement. Upon the reinstatement of such lapsed policy it shall,

for all purposes, be treated the same as if it had been in force on the date of liquidation and be subject to the terms and conditions of this agreement.

Payment of Policy Claims Other Than Claims on Non-Can Policies

5. The New Company will pay in full, in accordance with the terms and conditions of the policies or other contracts under which the claims shall have been or may be made, and whether or not the claims arose or matured prior or subsequent to the date of liquidation, all claims (except claims on Non-Can Policies) including, without limiting the same to, claims for death benefits, matured endowments, annuity payments, permanent total disability and premium waiver benefits, accident and sickness benefits, payments under policy settlement agreements, policy dividends left at interest with the Old Company prior to the date of liquidation, and payments under all other matured contracts under which the proceeds of policies and contracts were left with the Old Company prior to the date of liquidation; subject, however, to any and all defenses, offsets, counter-claims, cross-complaints and rescission rights against any such claim or claims which would have been available to the Old Company had this agreement not been made.

610 Reinsurance and Assumption of Non-Can Policies

6. The New Company does hereby reinsure and assume, as of the date of liquidation, the liability of the Old Company under all Non-Can Policies issued by the Old Company and outstanding and in force on the books and records of the Old Company at the date of liquidation, subject, however, to the terms, conditions and limitations, and only to the extent hereinafter
611 specifically provided and subject, further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against such policies or any claims and actions thereon which would have been available to the Old Company had this agreement not been made. The determination by the New Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so
612 reinsured hereunder.

Terms, Conditions, Limitations and Extent of Reinsurance and Assumption of Non-Can Policies

7. The obligation of the New Company with respect to the payment of monthly disability benefits on claims either filed or notice of which is filed with the New Company or any of its predecessors at any time after the date of liquidation under Non-Can Policies reinsured and

assumed under the preceding paragraph, subject to restoration as provided in paragraph 8 hereof, shall be limited to payment of the following percentages of the monthly disability benefits originally provided under said policies, according to the following premium classes, respectively:

Premium Class of Policy	Percentage of Original Monthly Benefit Assumed By New Company
1918 Premium class	
Issued under Rate Books: A 1445, A 1445 Z, A 1445Y, A 1445 X and A 1445 W. in period from: August, 1918—September, 1921	20%
1921 Premium class	
Issued under Rate Books: A 1687, A 1687 Z, A 1687 Y, A 1687 X, A 1687 W. in period from: September, 1921—July, 1926.	35%
1926 Premium class	
Issued under Rate Books: A 1958, A 1958 Z, A 1958 Y, in period from: July 1926—February, 1929.	45%

616 1929 Premium class

Issued under Rate Books:

A 2293 55%

in period from:

February, 1929—January, 1931.

1931 Premium class

Issued under Rate Book:

A 2367 65%

in period from:

617 January, 1931—March, 1932.

1932 Premium class

Issued under Rate Books:

A 2432, A 2432 Z, A 2499 90%

in period from:

March, 1932—February, 1935.

Aggregate policy

Issued under Rate Books:

A 2499, A 2567 90%

618 in period from:

October, 1933—July, 1935.

Note: All of the above mentioned Rate Books are Rate Books issued by the Old Company and copies are on file at the office of the New Company at 523 West Sixth Street, Los Angeles, California, and in the offices of the Insurance Commissioners or similar public officials of each state in which the Old Company has been transacting insurance business.

Notwithstanding the foregoing limitation on the obligation of the New Company to make

619 monthly disability payments on such policies, there shall be no change or reduction in the original premium rates on such policies, and to be entitled to the reinsurance and assumption of his Non-Can Policy by the New Company as aforesaid, the policyholder shall be obligated to continue to make premium payments at the rate originally provided in his policy.

Restoration of Non-Can Benefits

8. The New Company shall be obligated to
620 restore the monthly disability benefits, originally provided in the Non-Can Policies reinsured and assumed under this agreement by applying, and only by applying, to such extent and in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance Commissioner of the State of California as hereinafter provided, sums equivalent to the following:

(a) The net profits derived by the New Com-
621 pany from that portion of the business of its accident and health department represented by accident and health policies reinsured and assumed under this agreement, including all Non-Can Policies so reinsured and assumed hereunder; and

(b) The net profits derived by the New Company from that portion of the business of the nonparticipating branch of its life department represented by nonparticipating life insurance policies reinsured and assumed hereunder.

622 As of December 31, 1938, and tri-annually thereafter or at the time of the regular examination of the New Company by the Insurance Commissioner of the State of California, the New Company shall render to such Commissioner an accounting of the net profits, if any, arising from the sources referred to in (a) and (b) above, including the New Company's proposal as to the extent and manner of the application of sums equivalent to such net profits to
623 the restoration of benefits on said Non-Can Policies. Any such proposal may include provision for proportionate restoration of commissions to agents, who through accepting the assumption of their contracts on the basis hereinafter provided, have received less commissions on such policies than they otherwise would have received. After the approval of any such proposal by said Commissioner with such changes as he may require therein, the New Company
624 shall proceed to put said proposal into effect. The extent and manner of the restoration, as provided in any such proposal so approved by said Commissioner, shall be binding upon all holders of said Non-Can Policies and other persons interested therein.

The holders of any such Non-Can Policies surrendered to the New Company in connection with any settlement thereunder shall not be entitled thereafter to any of the benefits of such restoration.

625 The holders of any such Non-Can Policies which shall have lapsed after the date of liquidation and which shall not have been reinstated either in accordance with their terms or in accordance with the provisions of this agreement, shall not be entitled thereafter to any of the benefits of such restoration.

Reinstatement of Lapsed Non-Can Policies

9. The provisions of paragraph 4 of this agreement with respect to reinstatement of
626 lapsed policies shall apply to Non-Can Policies, subject to the terms, conditions and limitations contained in paragraphs 6 and 7 hereof.

Payment of Claims on Non-Can Policies Filed Prior to Date of Liquidation

10. The New Company shall be obligated to continue the payment of all disability benefits under Non-Can Policies, claims or notices of claims for which had been filed with the Old Company, prior to the date of liquidation, and
627 all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to any such settlement agreements; and subject, further, to any and all defenses, offsets, counter-claims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company had this agreement not been made.

628 Moratorium.

11. The reinsurance and assumption of obligations by the New Company herein provided for are subject to the condition that the new Company shall not be required, prior to sixty (60) days, and such additional period as may be determined by the Commissioner, from and after the effective date of this agreement, to make policy loans (except for the purpose of paying premiums on the same policy or on additional
629 policies issued on the same life), or to pay cash surrender values. This provision, however, shall not apply to any increase in values that are accumulated from premium payments or loan repayments which are received subsequent to the date of liquidation.

During such period as the moratorium is in effect the cash surrender option of all policies of the Old Company may be considered as nonexisting, except as provided above, and all pol-
630 icyholders who do not pay their premiums and who are entitled to a guaranteed value will be restricted to the automatic nonforfeiture value (properly adjusted for any policy indebtedness and accrued interest thereon) under the policy. At the discretion of the New Company, however, the cash surrender value under any policy, properly adjusted for any policy indebtedness and accrued interest thereon, may be allowed whenever it appears, in the sole judgment of the New Company, that the granting of such sur-

631 render value will be to the advantage and benefit of the Old Company policyholders as a class.

Assumption of Claims Against Old Company

12. The New Company hereby assumes and agrees to pay the following:

(a) All costs and expenses of the Commissioner in his capacities as conservator or liquidator of the Old Company, including attorneys' fees, as finally approved by the court;

632 (b) All unpaid taxes legally due the United States, the State of California, and other States, and Counties and Municipalities thereof, in connection with the business and assets of the Old Company, and remaining unpaid;

(c) Wages and salaries legally due to persons employed by the Old Company for services rendered and current bills for office supplies and incidental expenses in connection with the operation of the business of the Old Company and remaining unpaid;

633 (d) All claims against the Old Company filed with the Commissioner as liquidator, and finally allowed by the Commissioner and/or by the Court.

The obligation of the New Company with respect to items (a), (b), (c) and (d) above shall be to pay the same, in the order of preference established by law, and shall be limited, in the aggregate, to an amount equal to the value of the assets of the Old Company transferred to the

New Company pursuant to this agreement, on the basis of valuation provided in paragraph 13 of this agreement, less the amount of the reserves established by the New Company, with the approval or in accordance with the requirements of the Commissioner, with respect to policies of the Old Company reinsured and assumed by the New Company hereunder, and with respect to policy claims assumed by the New Company hereunder.

Valuation of Assets Transferred to New Company:

13. The assets of the Old Company transferred to the New Company pursuant to this agreement shall be valued at the amounts established therefor in the so-called "Convention Report" made in 1936 by the Commissioner and similar officials of certain other states in which the Old Company did business, with respect to the condition of the Old Company, as of December 31, 1935.

Agents

14. The New Company hereby assumes, subject to the limitation and exception hereinafter stated, any obligations under any contract heretofore made by the Old Company with any agent (regardless of classification), manager, or supervisor, it being recognized that the services of the agents who produced, or under his direction

or supervision was produced, the business reinsured or assumed hereunder in servicing said business, and the maintaining of same in force is to the ultimate interest and advantage of the policyholders of the Old Company. However, the obligations of the Old Company to pay commissions on Non-Can Policies reinsured and assumed by the New Company with the limitations as to disability benefits hereinbefore provided, shall be reduced as follows: (a) No commissions due after the date of liquidation shall be paid on Non-Can Policies on all forms issued prior to and including Forms A291 to A294, both inclusive, and (b) [D.L.E., J.] commissions due after the date of liquidation on all Non-Can Policies issued on all other forms, the holders of which accept ~~and reinsure~~ the reinsurance and assumption of [D.L.E., J.] their ~~assumption~~ policies [D.L.E., J.] by the New Company on the reduced basis hereinbefore provided, shall be reduced in proportion to the reduction in disability benefits to the insured under such policies. The New Company shall not assume or be bound by any agreement which the Old Company may have made with agents with respect to payment of commissions on policies after lapsation. To such extent, in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance Commissioner of the State of California, as provided in paragraph 8 of this agreement, the New

640 Company shall apply its net profits derived from the sources referred to in (a) and (b) of said paragraph 8 to the restoration to agents of the amounts of the reduction in their commissions on policies referred to in (b) of this paragraph to which said agents would have otherwise been entitled.

Additional Payments on Allowed Claims and Payments to Stockholders of Old Company

15. For a period of ten (10) years com-
641 mencing January 1, 1937, the New Company shall pay to the Commissioner for the benefit of holders of claims filed with the Commissioner and finally allowed by him or by the court, until such claims shall have been paid in full, and thereafter for the benefit of and distribution to the stockholders of the Old Company, the net profits of the New Company derived from the sources referred to in (a) and (b) of paragraph 8 of this agreement remaining after:

642 (a) The holders of Non-Can Policies referred to in said paragraph 8 shall have been restored to the full benefits originally stated in their policies as provided in said paragraph; and

(b) The New Company shall have established such reserves as may be deemed necessary by the New Company and the Commissioner for proper depreciation of the assets allocated to, or held by, the New Company for the benefit of the departments referred to in (a) and (b) of said paragraph 8; and

643 (c) Restoring to surplus allocated to the participating life department of the New Company the sum of $1,792,118.97, or its equivalent, together with interest thereon to date of restoration at the average rate earned by the New Company during such period on its invested assets; and

(d) Creating a reserve or adding to the surplus of the New Company an amount equal to the amount of policy reserve for Non-Can Poli-
644 cies released by reason of lapsation of such policies reinsured and assumed hereunder in excess of a lapse rate of ten per cent (10%) per year, or occasioned by substitutions or exchanges of such policies for other types of accident or health insurance.

At the end of said ten (10) year period, to-wit, on January 1, 1947, the New Company shall either (1) create a fund equal to $10 per $1000 of nonparticipating life insurance reinsured and
645 assumed by the New Company under this agreement and then remaining in force, or, (2) until said fund shall be so created, pay an amount equal to interest at the rate of six per cent (6%) per annum on an amount equal to said fund computed as aforesaid, which fund, and, until the creation thereof, said interest payments, shall be applied, first, to the extent necessary to complete the restoration and establishment of reserves referred to in (a), (b), (c) and (d) above, and, second, to the payment to the Com-

missioner to the extent necessary to pay any unpaid balance of claims filed with the Commissioner and finally allowed, and thereafter to distribution pro rata to the stockholders of the Old Company.

Any such payments to stockholders of the Old Company, in accordance with the foregoing, shall either be made pro rata to such stockholders, as their interests may appear according to the stock ledgers of the Old Company, or the New Company may issue to the Commissioner or to such stockholders appropriate certificates of the New Company evidencing its obligation to make such payments. Such certificates of interest may either be issued by the New Company to the Commissioner for distribution by him to stockholders of the Old Company in exchange for their stock certificates, or, at the election of the New Company, may be issued by the New Company directly to such stockholders upon the surrender of their stock certificates.

Mutualization of New Company

16. The New Company hereby consents to such plan for its voluntary mutualization in accordance with the laws of the State of California as now in effect or hereafter amended, as may be proposed by the Commissioner, as soon as

649 legally possible; and the Commissioner agrees to propose such mutualization plan, as the holder of the stock of the New Company. Such mutualization plan shall contain such terms and provisions, not inconsistent with this agreement, as may be required by law or approved by the Commissioner and the New Company. The purchase price paid by the New Company for the acquisition of its outstanding stock pursuant to such
650 mutualization plan to the extent not required by the Commissioner as the holder of said stock for the satisfaction of claims against the Old Company, filed with the Commissioner and finally allowed, shall be repaid by the Commissioner to the New Company.

Notice.

17. The New Company shall mail promptly to the insured named in all policies and supple-
651 mentary contracts of the Old Company in force at the date of liquidation, and any assignees thereof of record, a printed copy of the Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan concerning the Old Company, including a copy of this agreement as executed, to which the New Company may attach its certificate of reinsurance and assumption, inserted in an envelope, first class postage prepaid, ad-

652 dressed to the name and address of each of the persons aforesaid last shown upon the records of the Old Company. By "assignees of record" is meant assignees appearing upon the records of the Old Company at its Home Office.

Election of Policyholders and Claimants and Effect Thereof

18. Each policyholder and policy claimant of the Old Company may elect either to accept the 653 reinsurance and assumption of his policy or contract and/or any claim thereunder by the New Company, as provided in this agreement, or to file his claim against the Old Company with the Commissioner, in the manner provided by the Insurance Code of the State of California with respect to the filing of claims against an insurer in the process of liquidation. Persons so filing claims, who shall not withdraw them as herein- 654 after provided, are herein referred to as dissenting policyholders. The filing of a claim by any dissenting policyholder shall remove the policy or contract in respect of which said claim shall be filed, and the claim of persons under such policy or contract from the benefit of the provisions of this agreement with respect to reinsurance and/or assumption, and shall constitute an irrevocable election, on the part of such policy

or contract holder, and his beneficiary and all persons claiming under him, not to accept the benefit of such reinsurance and/or assumption provisions unless such claim shall be withdrawn by the claimant at any time prior to the expiration of sixty (60) days from and after the date of the expiration of the time for filing claims, as provided by law, with the written consent of the New Company, in which event such policy or contract, and the persons interested in the benefits thereunder, shall be entitled to the benefit of such reinsurance and/or assumption provisions and shall be bound by this agreement.

Every person entitled to accept any benefit under this agreement, who shall have indicated his election so to do either by not filing any such claim, or by withdrawing such claim if filed, shall be considered as assigning to the New Company all his claims against the Old Company, and the benefits of any rights, securities, liens, or preferences to which he may be entitled by reason of his claims and also as so assigning all interest to which his claims may entitle him in all of the assets of the Old Company, whether located in California or elsewhere. The New Company shall be entitled to assert and prosecute its claims, securities, liens or preferences of all

658 holders of policies or contracts, issued or assumed by the Old Company, who so assent to or become bound by the provisions of this agreement, and the New Company shall be entitled to assert and obtain in such manner as it may deem best, any rights, securities, liens, or preferences to which the holders of policies or contracts issued or assumed by the Old Company, who shall so assent to or become bound by the provisions
659 of this agreement, would have had.

Each holder of any policy or contract issued or assumed by the Old Company, who shall not have filed his claim against the Old Company with the Commissioner in the manner and within the period required by law, shall be deemed ipso facto to have assented to and become bound by the provisions of this agreement, and entitled to the benefits hereof, subject to all of its terms.
660 No holder of any such policy or contract of the Old Company who shall be deemed to have assented to or become bound by the provisions of this agreement shall have any rights, securities, liens, or preferences not accorded by this agreement.

661 Right of the New Company to Prosecute and Defend Claims

19. All claims or demands against the Old Company or its property now the subject of litigation in any court of competent jurisdiction in actions against the Old Company, and any and all claims and demands against the Old Company or its property filed with the Commissioner as liquidator, may be prosecuted and defended
662 until final judgment, and the New Company shall have the right to assist and join in such defense through counsel selected and paid by the New Company, and with all defenses, offsets, counterclaims, cross-complaints and rescission rights that might or could have been available to it, the Old Company, or to the Commissioner as liquidator, including all rights of appeal or review in whatsoever form.

663 Right of New Company to Settle or Pay Claims Against Old Company

20. In order that claims against the Old Company may be disposed of as speedily and economically as possible, the New Company shall have the right, with the approval of the Commissioner, to settle, compromise or compound any claim or demand against the Old Company or its property, whether or not such claim or demand shall have been filed with the Commis-

664 sioner and to pay in discharge thereof such amount as may be mutually agreed upon, and if such claim or demand shall not have been so filed, with like force and effect as if such claim or demand had been duly filed with the Commissioner and finally allowed as above set forth; provided, that no such settlement, compromise or compounding shall affect the right of the New Company to contest and litigate any other claims or demands of similar character.

665 Withholding of Assets

21. In the event of the institution of primary receivership or other proceedings in any of the states other than the State of California, wherein the Old Company ~~has~~ had [D.L.E., J.] assets and in which proceedings the assets located in any such state are liquidated and distributed exclusively to policyholders, creditors, stockholders or other persons resident of said state, such policyholders, creditors, stockholders
666 and other persons interested in assets of the Old Company, who accept in any such proceeding their pro rata share of the distribution of the assets of the Old Company located in said state, shall not be entitled to the benefits provided in this agreement.

Interpretation of Agreement and Accountings Thereunder

22. In the event of any dispute between the New Company and any person entitled to or who

667 has elected to accept the benefits of this agreement, the determination by the Commissioner as to the interpretation of this agreement shall be conclusive and binding upon both parties to any such dispute. The accounting methods or procedure of the New Company in computing any net profits, earnings or other amounts under this agreement and the amount and character of any and all reserves which may be established by the New Company under this agreement or in the
668 course of its operations following the execution of this agreement, shall be subject to the approval of the Commissioner, and all such accounting matters and computations and amounts and characters of reserves when so approved by the Commissioner shall be conclusive and binding upon the New Company and all persons entitled to any benefit under this agreement, including, but not limited to, persons who may have elected to file their claims with the Com-
669 missioner as liquidator.

Commissioner Not Personally Liable

23. The Commissioner is bound by the provisions of this agreement only in his capacity as such Commissioner and as conservator or liquidator of the Old Company. All undertakings and obligations herein set forth as undertakings or obligations of the Commissioner are made by the Commissioner only in his said capacities and to such extent as he had authority to make the same, and the Commissioner makes no warranty

of his authority to make the same. No personal liability on the part of the Commissioner is assumed under this agreement.

Liabilities of New Company Limited by This Agreement.

24. It is understood that the New Company does not assume any liability to any stockholders of the Old Company in any way arising out of or by virtue of their stock holdings in the Old Company, nor any liability of any character or description to creditors of the Old Company, whether policyholder creditors or others, except as and to the extent provided in this agreement; it being specifically understood that the New Company does not assume any liability of any character or description whatsoever of the Old Company except as and to the extent in this agreement expressly provided, and the provisions of this agreement shall be a complete and adequate defense by the New Company to any action, other than an action to enforce the express provisions of this agreement, which may be brought by such stockholders or creditors above mentioned.

Amendments

25. This agreement may be amended at any time while the Commissioner remains liquidator of the Old Company, by the consent of the Commissioner and the New Company, subject to the approval of the court.

673 Assignability of Agreement

26. This agreement and all rights, duties and obligations hereunder, shall inure to the benefit of and be binding upon the respective parties hereto, their several successors and assigns.

The original agreement, as hereby amended, is ratified, confirmed, approved and continued in full force and effect.

In Witness Whereof, the New Company has caused this agreement to be executed by its
674 president or vice president, attested by its secretary, and its corporate seal to be hereunto affixed, and the Commissioner has executed this agreement, the day and year first above written.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

By Asa V. Call

Its Vice President

Attest: T. Russell Harriman Jr.

Its Secretary

675 "New Company"

Samuel L. Carpenter Jr.

As Insurance Commissioner of the State of California and liquidator of The Pacific Mutual Life Insurance Company of California.

"Commissioner"

Endorsed: Filed Jul. 23, 1936. L. E. Lampton, county clerk; by M. E. Howard, deputy.

676 [TITLE OF COURT AND CAUSE.]

Order Permitting Intervention and Order to Show Cause.

Upon reading and considering the verified petition for intervention and for order to show cause of Pacific Mutual Life Insurance Company, and good cause appearing therefor,

It is hereby ordered, adjudged and decreed:

1. That said Pacific Mutual Life Insurance
677 Company be and it hereby is granted leave to intervene as a plaintiff in the above entitled proceeding, and said petition of said Pacific Mutual Life Insurance Company be and it hereby is ordered filed as a petition in intervention.

2. That all stockholders, policyholders and creditors of The Pacific Mutual Life Insurance Company of California, and all persons interested in its business and assets, and all persons to whom it is proposed to issue securities, pursuant
678 to the plan and agreement hereinafter mentioned, shall have the right to appear, and are hereby ordered to appear, at a hearing before Honorable Goodwin J. Knight, a judge of this court, at its court room in Department 38 thereof, on August 12, 1936, at the hour of 10 o'clock A. M., then and there to show cause, if any they have, why this court should not make its order (a) confirming and approving, and ratifying the permission given with respect to, that certain plan and agreement of rehabilitation, sale

679 and transfer of assets and reinsurance of The Pacific Mutual Life Insurance Company of California, a copy of which is attached to said petition as Exhibit A, and the carrying out of the terms and provisions thereof; (b) confirming and approving the action of Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, and as liquidator of The Pacific Mutual Life Insurance Company of California, and the action of Pacific Mutual Life Insurance Com-
680 pany in making, executing and carrying out that certain agreement provided for in said plan and agreement, a copy of which agreement as executed is attached to said petition as Exhibit B, and that certain amended agreement a copy of which is attached to said petition as Exhibit D; (c) confirming and approving the execution and delivery of the deed and bill of sale attached to said petition as Exhibit C and the action of said Samuel L. Carpenter, Jr., as Insurance Commis-
681 sioner of the State of California, and as liquidator of said The Pacific Mutual Life Insurance Company of California, in transferring and setting over to said Pacific Mutual Life Insurance Company all of the assets of said The Pacific Mutual Life Insurance Company of California the title to which was vested in him as liquidator, except the stock of said Pacific Mutual Life Insurance Company and also any and all rights or claims of whatsoever nature which respondent corporation or the liquidator, in his capacity as

liquidator of respondent corporation, may have against any of the present or past officers, directors or employees, as such, of respondent corporation, or against any other person, firm or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors, or employees of respondent corporation including rights or claims on any fidelity or surety bond or bonds given to or in favor of respondent corporation to secure the faithful performance by any of its officers, directors or employees of any of their duties as such, and (d) approving the terms and conditions upon which it is proposed, pursuant to said plan and agreement and said amended agreement, to issue and exchange securities after a hearing at said time upon the fairness of such terms and conditions.

3. That it is, and the court hereby finds and declares it to be impracticable and impossible for personal service to be made upon all interested parties of this said order to show cause. The matters herein involved are of common interest to a very large number of persons, many thousand in number. The interests of these persons can be fully protected by giving actual and personal notice to certain members of each group, as representatives of all of the group to which

685 they belong. It is both physically and practically impossible to give actual notice to all members of the group or any large percentage thereof.

Therefore, it is ordered that Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, shall select and choose six persons from each of the following groups of interested parties to act as representatives of all of said group, and shall cause to be personally served on 686 each of such persons so chosen by him, (a) a copy of this order to show cause, (b) a copy of the rehabilitation, sale and transfer of assets and reinsurance plan and agreement concerning The Pacific Mutual Life Insurance Company of California in the form proposed July 22, 1936, provided, however, that in lieu of the form of rehabilitation, sale and transfer of assets and reinsurance agreement attached thereto there shall 687 be attached a copy of the amended rehabilitation, sale and transfer of assets and reinsurance agreement dated July 23, 1936, and (c) a copy of the order entered herein July 22, 1936, titled "Order permitting, approving and authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of The Pacific Mutual Life Insurance Company of California," such copies to be served at least ten days prior to the time set for said hearing, viz.:

688 Six persons holding non-cancellable income policies from each of the seven premium classes of such policies whose monthly disability benefits are being reduced in the plan and agreement of rehabilitation, sale and transfer of assets and reinsurance;

Six persons holding non-participating life insurance policies;

Six persons holding participating life insurance
689 policies;

Six persons holding annuity contracts;

Six persons holding accident and health policies, other than non-cancellable income policies;

All of the types of policies and contracts hereinbefore described shall be policies and contracts heretofore issued by The Pacific Mutual Life Insurance Company of California; also

690 Six persons being record owners of capital stock of said The Pacific Mutual Life Insurance Company of California; ~~and~~ none of whom shall be persons who were directors of said corporation on July 22, 1936; and

Six persons who are general creditors of said The Pacific Mutual Life Insurance Company of California, other than upon policies of life insurance or contracts of annuities hereinbefore referred to.

691 4. That further notice of the hearing upon this order to show cause shall be given by the mailing of a copy of the three documents referred to in (a), (b) & (c) of paragraph 3 hereof, by registered United States mail, postage prepaid, at least fifteen days prior to the date of said hearing, addressed to each of the commissioners of insurance, or other heads of state insurance control boards, in each of the states in 692 which said The Pacific Mutual Life Insurance Company of California was qualified to do an insurance business, to wit, as shall be determined by said Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

5. That further notice of the hearing upon this said order to show cause shall be given by the publication of this said order, for at least ter consecutive days, beginning not less than fifteen 693 days prior to the date of said hearing, in the following newspapers of general circulation:

The Los Angeles Times, The Los Angeles Examiner, The Los Angeles Evening Herald-Express, The Illustrated Daily News, and The Evening News, all published at Los Angeles, California, and the San Francisco Chronicle, published at San Francisco.

and also by posting a copy of this said order at three public places in the city of Los Angeles, to wit:

The Justicia street entrance of the Hall of Justice;

The Broadway entrance of the Hall of Records;

The Main street entrance of the City Hall;

and in three public places in the city of San Francisco, to wit:

~~The main entrance of the State Building.~~

In a conspicuous place in each of the following buildings: The State Building, the City Hall and the United States Postoffice

and the court hereby finds and declares that the foregoing times and methods of notice to the foregoing persons constitute a reasonable, practical and sufficient notice to all policyholders, creditors and stockholders of The Pacific Mutual Life Insurance Company of California and all other persons interested in its business and affairs and in this proceeding.

Dated his 23 day of July, 1936.

DOUGLAS L. EDMONDS,
Judge.

Endorsed: Filed Jul. 23, 1936. L. E. Lampon, county clerk; by M. E. Howard, deputy.

697 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404-673.

Complaint in Intervention to Set Aside Order of Liquidation, to Set Aside Order Permitting, Approving and Authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of the Pacific Mutual Life Insurance Company of California, and to Strike From the Files of the Court the Complaint in Intervention of the Pacific Mutual Life Insurance Company and to Vacate the Order to Show Cause Granted Thereunder.

698

Comes now George I. Cochrane, W. H. Davis, 699 Douglas E. C. Moore, Stanley M. McClung and for their petition in intervention they allege:

I.

Your interveners are all stockholders in The Pacific Mutual Life Insurance Company of California now and prior to July 22, 1936, owning approximately ten per centum of the issued and outstanding capital stock of said corporation, and all except said McClung were and are also duly elected, qualified and acting directors of said corporation.

700 II.

That on or about the 22nd day of July, 1936, at a directors meeting of said corporation, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, appeared accompanied by a deputy attorney general of the state of California. That at said time said Carpenter stated to the board of directors that he intended to declare the corporation insolvent and that he proposed to take over the possession and
701 custody of the property of said corporation, and thereupon he exhibited several printed documents which he stated he intended to file in the above entitled court to accomplish that object and purpose; and he further stated that he had conceived a plan for the rehabilitation of said corporation, all of which matters were contained in the aforesaid printed documents. None of the interveners aforesaid who were directors of said corporation and who were present at said meeting had any
702 prior knowledge of the fact that said Commissioner was about to declare the corporation insolvent and take over its property and assume charge of it, nor did said persons have any knowledge of the fact that all of the aforesaid documents had been in the course of preparation for weeks. That said documents had been prepared under the supervision of said Commissioner with the assistance of certain of the directors and officers of the corporation who had not before disclosed to the majority of the directors of said

703 corporation or to any of the interveners that it was the intention that the corporation be declared insolvent, nor that they were assisting the Commissioner in the accomplishment of such a purpose. The interveners hereby make reference to and adopt in this complaint the various documents on file in this action and hereby allege that all of said documents were prepared long prior to said meeting of the board of directors and entirely without the knowledge of the aforesaid
704 interveners, said documents being, application for order appointing conservator, order appointing conservator and restraining order, application for order to liquidate, order of liquidation, petition for order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of the Pacific Mutual Life Insurance Company of California, and order permitting, approving and authorizing rehabilitation, sale and transfer of assets and
705 reinsurance plan and agreement of The Pacific Mutual Life Insurance Company of California, also the various printed forms of rehabilitation and amended rehabilitation agreements.

III.

That at the time of said meeting and prior thereto intervener George I. Cochran, then chairman of the board of directors of said company, had been negotiating for some time with one of the largest insurance companies on the Pacific Coast to the end that a condition in the Pacific

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706 Mutual Company which was created by contingent liability on non-cancellable policies might be corrected. At the time of said directors meeting, said George I. Cochran had in his possession a detailed and formal proposal by said other corporation, which proposal interveners believe would have had the effect of correcting and remedying the situation referred to. After said Commissioner had concluded his remarks to the effect that the company was immediately to be
707 declared insolvent and would be put into liquidation, said George I. Cochran, as chairman of the board of directors, stated to said Commissioner and the board of directors that he was in possession of the proposal above referred to and asked for its consideration. The board of directors were told by said Commissioner that said proposal was unsatisfactory and would not be considered in any way by him, nor would further negotiations concerning the proposal be permitted
708 nor would any time be given for consideration of any such project. At that time intervener W. H. Davis, a director, stated that the action of the Commissioner might have such disasterous results to the welfare of the corporation that it would be proper for the matter to be considered for at least twenty-four hours so that all of the directors and other persons interested would have an opportunity to advance proposals to correct the aforesaid situation and said Davis moved that the board of directors meeting be adjourned

709 for twenty-four hours to permit time for the consideration of such matters. In answer to said request said Commissioner and the deputy attorney general present told the said W. H. Davis and the other directors that any attempt by them to take any action with respect to the affairs of the company might subject any such person to a felony charge. Thereupon said George I. Cochran, as chairman of the board of directors, stated to said Carpenter and the board of directors that 710 he could not see that under such conditions the directors had any recourse other than to acquiesce in the plan of the Commissioner, with which plan none of the directors were at all familiar except those who had assisted in its preparation, as hereinbefore stated, and said meeting was adjourned.

IV.

Immediately thereafter said Commissioner accompanied by Asa V. Call, one of the directors 711 of said company, and Walter K. Tuller, a private attorney, being persons who assisted for some time in the preparation of the aforesaid documents and in the preparation of the plan and scheme hereinafter mentioned, appeared before the presiding judge of the Superior Court of Los Angeles county and presented at that time an application for an order appointing said Commissioner conservator, order appointing said Commissioner conservator and restraining order, application for order to liquidate, order of liqui-

712 dation, petition for order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of The Pacific Mutual Life Insurance Company of California and order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance Plan and agreement of The Pacific Mutual Life Insurance Company of California.

V.

713 That at the conclusion of the directors meeting aforesaid, it was stated to the directors that they were no longer directors and that no one other than the Insurance Commissioner had any power to perform any act upon the part of the corporation. However, said Asa V. Call appeared in court as aforesaid and apparently filed with said court a purported written consent of the corporation, which consent is referred to in the various *order* of the court herein made. That all of
714 the papers filed with, and orders made by, said court were filed and made at the same time; in other words, immediately after the above entitled court made the order appointing said Commissioner as conservator, an application was made for an order to liquidate and wind up the affairs of the company under section 1016 of the Insurance Code, which section provides that after the appointment of the conservator and it shall appear that further efforts to proceed as conservator would be futile, an application may be made

715 for an order for the liquidation or reinsurance or rehabilitation of the corporation. Said section of said code further provides that the court shall not make such an order until after a full hearing upon such application. Contrary to the provisions of said section there was no hearing at all except the presentation of said papers by the Insurance Commissioner and the acquiescence therein by said Call, purporting to represent the corporation, and a brief statement by said Com-
716 missioner that the plan was the only one satisfactory to him. Interveners allege that that portion of the order of liquidation that recites that notice has been duly given of the application therefor is wholly untrue and is contrary to the facts except as hereinbefore stated. Interveners further allege that the corporation was not represented in court by its duly authorized attorneys as stated in said order, or at all, nor did the corporation consent to the relief prayed for in said
717 application except as hereinbefore stated. Interveners further deny that a full or any hearing was granted to anyone other than said Commissioner and the persons accompanying him, none of whom had any proper or validly obtained authority to represent the corporation. That immediately thereafter another document, which had previously been prepared, being petition for order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of The Pacific Mutual Life

718 Insurance Company of California, the purpose of which was to effect the transfer of all the assets of the corporation to a new corporation to be organized for the purpose by said Commissioner and the aforesaid directors cooperating with him, was offered to the court, whereupon the order permitting same, which said order had previously been prepared and printed, was issued. Interveners allege that the court was without any power or authority whatever to make said order
719 and to permit the transfer of assets of said corporation for the reason, among others, that the transfer of the assets of said corporation without notice to all persons interested including stockholders, policy holders and creditors of said corporation is without due process of law and in violation of articles V and XIV of amendments to and sections 8 and 10 of article I of the Constitution of the United States.

VI.

720 That on the day following said proceedings a complaint in intervention and for an order to show cause was filed in said proceeding on behalf of the Pacific Mutual Life Insurance Company (hereinafter called the new corporation), which alleged that under the authority of the court given the preceding day the Commissioner had caused said interveners to be duly organized as a corporation and that he had subscribed to the stock thereof, all as stated in the rehabilitation plan as provided by the aforesaid order of the court.

721 Subsequent to said order and prior to the filing of the complaint in intervention, the Commissioner had deeded to said new corporation all of the assets of the old corporation and said complaint in intervention asked for an order to show cause directed to the several persons named therein as to why all of the matters theretofore presented to said court should not be ratified and approved. Whereupon, the court issued its order permitting the intervention of said corporation
722 and granted and issued the order to show cause therein prayed for.

VII.

That for a period of several weeks prior to the institution of the court proceedings aforesaid, said Asa V. Call and A. N. Kemp, the president of the old corporation, and their servants, agents, attorneys and employees, and others at this time unknown to the interveners herein, prepared a plan and scheme whereby they could, without
723 giving the board of directors of said old corporation, or the stockholders or policy holders and other creditors thereof an opportunity to voluntarily rehabilitate said old corporation, perpetuate themselves, without any substantial investment upon their part, as persons in control of a new corporation which would own all of the assets of the old corporation. Said proposed rehabilitation plan, sponsored by said persons, makes no provision for the ownership of the assets in the new corporation by the stockholders of the old corpo-

724 ration after all claims and creditors have been paid, but, on the contrary, stockholders in the old corporation are entirely, without any notice or hearing whatsoever, deprived of all of the assets owned by them, and in fact they have already been deprived of all assets by the purported order of this court made as aforesaid without due or any notice or hearing whatsoever, and in violation of articles V and XIV of the amendments to, and sections 8 and 10 of article I of the
725 Constitution of the United States.

VIII.

Interveners are informed and believe and upon that ground allege that each and all of the documents filed before the court by the Commissioner were prepared by private counsel at the instance of the persons above named in paragraph VII to the end that they would be used by the Commissioner in the manner and for the purpose for which they were prepared and for the attainment
726 of the objects sought by virtue of the plan and scheme of such persons and to the end that such persons and the purported new corporation formed at their suggestion, instance and solicitation, might be enabled by virtue of a decree of this court, to wrongfully and unlawfully divert and convert to the use and benefit of the new corporation, the assets of the old corporation. That the court appearances as aforesaid were not in any way adverse in character. That the manner in which the proceedings were prepared and in

727 which the cause was conducted deprived, and does now deprive, and will in the future deprive the directors, stockholders, policy holders and creditors of the old corporation of their property without due process of law in violation of articles V and XIV of the amendments to, and sections 8 and 10 of article I of the Constitution of the United States, in that they were given no opportunity whatsoever to propose any plan to retain the assets in the old company or to propose any
728 plan at any time prior to a time when the assets of the old company had already been converted by the purported order of the court heretofore referred to.

Interveners are informed and believe and upon such ground allege that had it not been for the purported order of the court permitting the transfer of all the assets of the old corporation to the new corporation, which order is wholly without authority in law, that a transacion could have
729 been negotiated with the insurance company heretofore referred to, which transaction would have the effect of preserving, without prejudice, the interests of all parties concerned.

IX.

Interveners further allege that the only substantial ground upon which the Commissioner has predicated the actions heretofore taken is that the reserves for the non-cancellable policies are insufficient. In arriving at such a determination the Commissioner, without any proper or

730 just basis and without the benefit of adequate actuarial experience to guide him, and based upon entirely erroneous and improper factors, made a determination that the sum of approximately twenty-four million dollars was needed as additional reserves appropriated to such non-cancellable policies. The interveners allege that it could be readily established, if they should ever be granted a full and open hearing thereon, that such reserves may be calculated upon a reason-
731 able and proper basis so that said reserves would be easily and readily restored to the extent necessary without the necessity of depriving the old company of any of its assets and without the necessity of causing loss to any policy holder or creditor.

Wherefore, the intervenors pray that the court make its order vacating the order of liquidation made herein and each and every order subsequent thereto and that said court strike from the files
732 the complaint in intervention of The Pacific Mutual Life Insurance Company, and that it vacate and set aside the order to show cause issued thereunder and for such other and further orders as to this court may seem just and equitable in the premises.

HAROLD JUDSON,
Attorney for Interveners.

Verified.

Endorsed: Filed Aug. 6, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy. D: 11.

733 In the Superior Court of the State of California, in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. Pacific Mutual Life Insurance Company of California, a corporation, respondent, Wm. H. Neblett, intervenor. No. 404,673.

Complaint in Intervention to Set Aside and Vacate All Orders of the Court Made Herein Upon the Petition of Samuel L.
734 **Carpenter, Jr., Insurance Commissioner of the State of California, the Pacific Mutual Life Insurance Company of California, a Corporation, and the Pacific Mutual Life Insurance Company.**

Comes Now Wm. H. Neblett and by leave of the court files this, his complaint in intervention herein, and for cause of action and intervention alleges:

I.

735 That at all times herein mentioned the intervenor was and is the owner and holder of policy No. 547567 issued by the respondent, the Pacific Mutual Life Insurance Company of California, a corporation.

II.

That at all times mentioned herein, the Pacific Mutual Life Insurance Company of California, was and is a corporation incorporated under the laws of the state of California and

736 has had, and still has, its principal place of business in the city of Los Angeles, county of Los Angeles, state of California; that, for the purposes of brevity, said corporation is hereinafter referred to as Old Company.

III.

That at all times herein mentioned Pacific Mutual Life Insurance Company was and is a corporation incorporated under the laws of the state of California, having its principal offices
737 and place of business in the city of Los Angeles, county of Los Angeles, state of California, and for the purposes of brevity said corporation is hereinafter referred to as New Company.

IV.

That at all times herein mentioned Samuel L. Carpenter, Jr., was and is purporting and assuming to act as Insurance Commissioner of the State of California, and that for the purposes of brevity said Samuel L. Carpenter, Jr., is herein-
738 after referred to as petitioner.

Intervenor further alleges on information and belief that prior to the appointment of said Samuel L. Carpenter, Jr., as said Insurance Commissioner of the State of California it had been determined by those officers of the Old Company who are present officers and directors of the New Company that the Old Company would be liquidated and its assets transferred to New Company, and it was agreed and understood be-

739 tween these persons that the said Samuel L. Carpenter, Jr., would, if possible, be appointed as said Insurance Commissioner in order that there would be an Insurance Commissioner friendly to them at the time of the said predetermined liquidation and sale of assets of Old Company to New Company; that subsequently, said Samuel L. Carpenter, Jr., was appointed Insurance Commissioner by the governor of the state of California, through the efforts and at

740 of the Old Company who are officers and directors [R. D. W. by E. W. G.] the request of the said officers and directors of the New Company.

V.

Intervenor alleges on information and belief that heretofore, to-wit, on or about the 22nd day of July, 1936, petitioner, acting solely under the domination and at the direction of the said persons who were directors and officers of the Old

741 Company, and who are now officers and directors of the New Company, and not using the slightest judgment or discretion of his own, instituted the above entitled proceedings. Intervenor is informed and believes, and upon such information and belief alleges that said proceedings were commenced and instituted in furtherance of a conspiracy wherein the said officers and directors of the Old Company who are now officers and directors of New Company, heretofore referred to in paragraph IV hereof, sought to gain control

742 of the assets and business of Old Company. Intervenor further alleges, on information and belief, that an additional object of said conspiracy was the prevention of the consummation of a plan for the rehabilitation of Old Company, then in process of negotiation, wherein the Occidental Life Insurance Company, a California corporation, had offered to purchase from said Old Company all of said Old Company's assets and had offered to reinsure and continue in full
743 force and effect all of the policies of insurance of Old Company, including this Intervenor's policy.

VI.

Intervenor alleges, on information and belief, that prior to the filing of this complaint in intervention, petitioner, in accordance with a plan and scheme prearranged by and between petitioner and the said officers and directors of the Old Company who are now officers and directors of
744 New Company, made application for the following orders to the court herein, falsely representing that said Old Company was insolvent within the terms and provisions of the Insurance Code of California: (1) Order appointing conservator and restraining order; (2) Order of liquidation; (3) Order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of the Pacific Mutual Life Insurance Company of California.

745 That the court, induced by said false representation, made and entered the said orders and all the other judgments, orders and decrees heretofore made herein, upon the application of petitioner—Old Company and New Company. All of said orders are hereby incorporated herein by reference in their entirety the same as though set forth herein in full.

VII.

746 Intervenor alleges on information and belief that the rehabilitation, sale and transfer of assets and reinsurance plan and agreement of the Pacific Mutual Life Insurance Company of California is not the best possible plan for the protection of policy holders of the Old Company, as was represented by petitioner; that, on the contrary, under said plan, the protection and value of said policies of insurance, including that of 747 intervenor, will be greatly lessened and impaired. Intervenor further alleges, upon information and belief, that if the sale and transfer of said assets from said Old Company to said New Company is set aside and the sale of said assets to said Occidental Life Insurance Company is authorized and affected, the interests of all said policy holders, including that of this intervenor, will be more fully and adequately protected.

748 VIII.

That the orders, judgments and decrees herein referred to in paragraph VI hereof, are unlawful, void and of no force and effect for the reason that no hearings of motions for said orders were had as required by section 1016 of the Insurance Code of the state of California. Intervenor alleges on information and belief that said orders were all signed *ex parte* and without no-
749 tice to the policy holders, in direct violation of the provisions of section 1016 of the Insurance Code providing that no such orders are to be made until after a full hearing of motions therefor. Intervenor alleges, upon information and belief, that no hearing was had at all.

IX.

Intervenor alleges on information and belief that the orders, judgments and decrees herein re-
750 ferred to in paragraph VI hereof are unlawful, void and of no force and effect for the reason that at no time mentioned therein has the Old Company been insolvent within the terms and provisions of the Insurance Code of California.

X.

That the orders, judgments and decrees herein referred to in paragraph VI hereof are unlawful, void and of no force and effect for the reason that each of them was and is a violation of the

751 intervenor's rights under the following provisions of the Constitution of the state of California:

Sections 7, 11, 13, 16, 21 and 22 of Article *1*.

Section 1 of Article III.

Section 1 of Article XII.

XI.

That the orders, judgments and decrees herein referred to in paragraph VI hereof are unlawful, void and of no force and effect for the reason
752 that each of them was and is in conflict with section 1 of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, intervenor prays judgment as follows: That the court make its order vacating and setting aside all orders of the court heretofore made herein upon the petition of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, the Pacific Mutual Life Insurance Company of California, a corporation,
753 and the Pacific Mutual Life Insurance Company, a corporation, and for such other and further orders as to this court may seem just and equitable in the premises.

R. DEAN WARNER,

Attorney for Intervenor Wm. H. Neblett.

Verified.

Endorsed: Filed Aug. 10, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy. D 11.

754 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent, Carl C. Katleman appearing for himself and all others similarly situated, intervenor. No. 404673.

Petition of Intervention by Carl C. Katleman,
755 **for Himself and All Others Similarly Situated.**

Comes now, Carl C. Katleman, and by leave of the court first obtained, files this, his complaint in intervention for himself, for Dr. Barney Kully of Los Angeles, California; Henry Monsky, William Grodinsky, J. Harry Kulakofsky, Morris Levey, Harry Rubenstein, all of Omaha, Nebraska; and for all others similarly situated, and for cause of action and intervention
756 alleges:

I.

That your petitioner of intervention is at this time the owner of two certain policies issued by the respondent herein under date of January 1924, said policies being known as non-cancellable income policies, bearing numbers 4645358 and 4645357; that all of the premiums due under the terms of said policies have been paid at or

757 prior to the time same became due and said policies and each of them are at this time in full force; that said policies are at this time very valuable and your petitioner has been informed and *therefor* alleges the fact to be that it would be impossible for him to replace said policies in any company that is writing insurance of that type.

II.

758 That Dr. Barney Kully is a resident of the city of Los Angeles, California; that Henry Monsky, William Grodinsky, J. Harry Kulakofsky, Morris Levey and Harry Rubenstein are all residents of the city of Omaha, Nebraska and are each the owners of one or more of the non-cancellable income policies issued by the respondent herein; that all of said policies are at this time more than ten years old and that all
759 of the premiums required to be paid under the terms of said policies and each of them have been, so that said policies and each of them are at this time in full force and effect; that said policies are at this time very valuable and it would be impossible to replace same in any company writing this type of insurance; that each of the above have requested your petitioner to appear for and represent them at this hearing.

III.

760 That your petitioner in intervention appears not only for himself and all those specifically set forth in paragraph II but for all others similarly situated who are at this time the owners of non-cancellable income policies, issued by the respondent herein, that are now in full force and effect.

That your petitioner in intervention appearing
761 for himself and all others similarly situated objects to the purported sale of all of the assets of the respondent herein to the Pacific Mutual Life Insurance Company for the reason that sale is contrary to law and in violation of the rights of all the holders of the non-cancellable policies.

IV.

Your petitioner further alleges that all of
762 the assets of the respondent herein are subject to any and all claims that might at any time hereafter arise under policies now outstanding and known as non-cancellable policies; that it would be a fraud upon the holders of said policies to permit the transfer of any of the assets of respondent without fully protecting all of the rights of the holders of the non-cancellable policies in accordance with the terms and

763 agreements provided in said policies and each of them; that the Insurance Commissioner be prevented from allowing certain preferences to certain types of policies issued by respondent to the damage of the holders of the non-cancellable policies.

V.

That the court refuse to confirm the transfer
764 of the assets of respondent to the Pacific Mutual Life Insurance Company as provided for in Exhibit 'A' unless the rights of all of the policy-holders are fully protected and given the same treatment; That the court refuse to confirm the agreements provided for in Exhibits 'B' 'C' and 'D' for the reason that they attempt to deprive the holders of non*cancellable policies of their contractual rights and attempt to prefer
765 certain types of policies as against certain other types; that the holders of all types of policies issued by respondent have the same rights to look to all of the assets of respondent in accordance with the terms of their policies; that there is no provision under the laws of the state of California giving the Insurance Commissioner the right to arbitrarily reduce the payments under certain types of policies and not against all types issued by respondent.

766 VI.

Your petitioner further alleges that the attempt of the Insurance Commissioner of the State of California to force the holders of non-cancellable policies to accept sums substantially smaller than those provided for in their policies is an attempt to re-write the policies issued by respondent and is in direct violation of the property, and contractual rights of said policy holders and is in violation of the laws and Consti-
767 tution of the state of California and of the Constitution of the United States and is an attempt to deprive petitioner and all others similarly situated, of their property without due process of law and further is an attempt to vary the terms of the policies and the contractual rights therein contained.

VII.

Your petitioner further states that a report has been issued by the Insurance Commissioner
768 of the State of California co-operating with the insurance commissioners of certain other states wherein it is set forth that the affairs of respondent have not been properly operated for more than ten years, resulting in large losses to the policy-holders and in that connection your petitioner alleges that the Insurance Commissioner of the State of California and his predecessors in office have been guilty of gross malfeseance, in permitting same to continue, to the great damage to the policy holders.

769 VIII.

Your petitioner further states that in reports heretofore issued by Bests, a recognized insurance authority, that certain charges have been made with reference to certain investments made by the officers and directors of respondent that resulted in large losses to respondent; that the Insurance Commissioner of the State of California and his predecessors in office must have
770 had knowledge of said losses but no steps were taken to investigate whether or not said officers and directors might be personally liable by reason of said losses.

IX.

Your petitioner further states that he has been advised and therefore alleges upon information and belief, that a large number of the former
771 officers and directors of respondent are the officers and directors of the Pacific Mutual Insurance Company and in that connection your petitioner alleges that said officers and directors have demonstrated that they are incapable of properly managing and operating an insurance company so as to properly protect the interests of the policy holders and more particularly the interests of the non-cancellable policy holders.

772 X.

Your petitioner further states that he has been advised, and therefore alleges upon information and belief, that notwithstanding the losses that have occured during the past ten years as set forth in the report recently issued by the Insurance Commissioner of the State of California and other states that the respondent has been permitted to declare and pay dividends to its stock-holders all to the damage of the policy hold-
773 ers and particularly the non-cancellable policy holders; That the Insurance Commissioner of the State of California and his predecessors in office must have had knowledge of the payment of said dividends notwithstanding the losses that were incurred in the operation of respondent's business but no proceedings have been instituted to recover any of said dividends unlawfully declared and paid; your petitioner states that he has been advised, and *therefor* alleges upon in-
774 formation and belief, that enormous salaries have been paid to the officers and directors of respondent during the past ten years and that no attempts were ever made to recover any of the salaries so paid.

XI.

Your petitioner further states that by reason of the report issued by the insurance commissioners of several states as hereinbefore referred to, that the Insurance Commissioner of the State

775 of California had knowledge of the affairs of respondent and notwithstanding permitted said respondent to continue to issue non-cancellable policies and that at this time the Insurance Commission of the State of California requires that on said policies issued as recently as July 1936 that the holders of same should accept ninety (90%) per cent of the face of said policies; that under the terms of a communication issued by said Insurance Commissioner your petitioner
776 would receive but thirty-five (35%) per cent of the original monthly benefit provided for in the policies issued by respondent to your petitioner; that in lieu of accepting such reduced protection that claims can be filed same to be prorated from certain funds to be obtained; that the amount to pay such claims would be wholly inadequate to properly pay petitioner and all others similarly situated; that all of the assets of the respondent should be utilized to protect all of
777 the policy holders and no distinction or preference should be permitted.

X.

Your petitioner further states that the Insurance Commissioner of the State of California is not properly protecting the interests of your petitioner and all *other* similarly situated and *therefor* objects to his continuing as the liquidator of the respondent in that he is attempting to permit certain preferences in favor of certain policy holders as against the interest of other

778 types of policy holders and more particularly the holders of non-cancellable policies.

Wherefor your petitioner appearing for himself, for all those specifically set forth in Par. 2 and for all others similarly situated, prays that the purported transfer of the assets of the respondent be set aside as being without legal authority, that an order be entered that the holders of all types of policies should be treated equally and on the same basis; that no single
779 type of policy holders shall be preferred as against any other type or group, that the present officers and directors shall be removed for the reason that they have failed to properly operate the respondent's business, all to the damage of the policy holders of every type, that an investigation be ordered to determine if there is any liability against any of the former or present officers and directors for any acts that resulted in losses to respondent and for such other, further
780 and additional relief as may appear to be just and equitable in the premises.

CARL C. KATLEMAN,
CARL C. KATLEMAN,
In Pro. Per.

CARL C. KATLEMAN,
Attorney at Law, for self and others.

Verified.

Endorsed: Filed Aug. 10, 1936, 4:10 P. M. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

781 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent; Pacific Mutual Life Insurance Company, intervenor.

Harold S. Cook, intervenor. No. 404673.

Complaint in Intervention on Behalf of
782 **Shareholders.**

Leave of court so to do having been first obtained Harold S. Cook for himself and for and on behalf of all other persons similarly situated who desire to avail themselves of such representation and share the cost thereof, hereby intervenes in the within action and for his complaint in intervention alleges as follows:

I.

783 At all times herein mentioned Samuel L. Carpenter, Jr., has been and now is the duly appointed, qualified and acting Insurance Commissioner of the State of California.

II.

At all times herein mentioned The Pacific Mutual Life Insurance Company of California has been and now is a corporation organized and existing under and by virtue of the laws of the state of California, and at all said times to

784 July 22, 1936, said corporation has been actively engaged in the life, health and accident insurance and annuity business in the state of California and elsewhere throughout the United States. Said corporation is hereinafter sometimes referred to as the "Old Company."

III.

At all times herein mentioned since about July 22, 1936, Pacific Mutual Life Insurance Com-
785 pany has been and now is a corporation organized and existing under and by virtue of the laws of the state of California. Said corporation is hereinafter sometimes referred to as the "New Company."

IV.

At all times herein mentioned intervenor Harold S. Cook has been and now is a shareholder of the Old Company, being the owner during all of that time of not less than four hun-
786 dred six (406) shares of the capital stock of said corporation. Said intervenor is hereinafter sometimes referred to as the "Intervening Shareholder."

V.

On or about August 3, 1936, the intervening shareholder and Allan C Balch, Ferdinand R. Bain, Shannon Crandall and H. H. Wagenseller associated themselves together as a protective committee of the stockholders of The Pacific

787 Mutual Life Insurance Company of California for the purpose of acting and appearing for and on behalf, and representing the interests, of such shareholders of such Old Company as desired to avail themselves of such representation in connection with the within proceedings. Thereafter numerous shareholders of said Old Company authorized and numerous other shareholders are from time to time authorizing, said persons to act as their attorney in fact to take such steps
788 as they might deem advisable to investigate the so-called Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement, referred to in the within proceedings, and to protect their interests as shareholders of said Old Company, and in that connection to take such proceedings in court or otherwise, either in the name of said shareholders or in the name of others, as said committee might deem advisable. A true and correct copy of the form of written authoriza-
789 tion which has been and is being executed by said shareholders is attached hereto, marked "Exhibit A" and by this reference made a part hereof as though fully set forth. In this connection the intervening shareholder alleges that at noon on August 10, 1936, shareholders owning approximately fifty thousand (50,000) shares of the capital stock of said Old Company had authorized said committee to act for them in accordance with the terms of said Exhibit A.

790 VI.

By reason of the facts hereinabove alleged the intervening shareholder appears herein for himself and for and on behalf of all of the shareholders hereinabove in paragraph V referred to and for and on behalf of all other shareholders of said Old Company who may hereafter authorize him and/or said protective committee to act for them. In this connection the intervening shareholder alleges further that the number of
791 said shareholders is large and that it would be and is impracticable to bring them all before the court and for that reason said intervening shareholder sues and appears herein for the benefit, and for and on behalf, of all of said shareholders and of all other shareholders who may desire to avail themselves of such representation and agree to share the expense thereof.

VII.

792 On or about July 22, 1936, petitioner herein, as Insurance Commissioner of the State of California, filed in the within court an application for an order of said court appointing him conservator of said Old Company and thereafter on the same day an order of said court was made and entered under and by virtue of the terms of which said petitioner was appointed conservator of said Old Company and of its business, assets and affairs, and said petitioner was ordered to

793 take possession forthwith of all the books, records, property and assets of said Old Company and as conservator to conduct its business for the benefit of its policy holders, creditors and stockholders and of the public in general.

VIII.

On July 22, 1936, and concurrently with the filing of the application for appointment of conservator hereinabove in paragraph VII referred to, said petitioner filed in the within court an 794 application for an order to liquidate, and thereafter and on the same day an order of said court was made and entered under and by virtue of the terms of which said petitioner was appointed liquidator of the assets and business of said Old Company, all of the right, title and interest of said Old Company in and to its assets and property was vested and confirmed in said petitioner as liquidator, and said petitioner as liquidator was ordered to conduct, manage and operate the 795 business of said Old Company, to wind up and liquidate its business, and to formulate, prepare and submit forthwith if possible for the approval of said court a plan and agreement of reinsurance and rehabilitation or sale and transfer of assets.

IX.

On July 22, 1936, and concurrently with the filing of the applications hereinabove in paragraphs VII and VIII referred to, said petitioner

796 filed in the within court a petition for an order permitting, approving and authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of said Old Company and thereafter and on the same day an order of said court was made and entered approving said proposed plan and agreement, ordering said petitioner forthwith to organize a new corporation and to subscribe to its capital stock by the use of funds and assets under his control
797 as liquidator of said Old Company, authorizing him forthwith to execute an agreement in form substantially as set forth in said plan, ordering said petitioner forthwith to transfer and set over to said New Company all of the assets of the Old Company, except the stock of said New Company and except any claims which the Old Company might have against any of its present or past officers, directors or employees or against any other person by reason of wrongful or illegal
798 acts or omissions of any of such past or present officers, directors or employees, authorizing and ordering said petitioner to do any and all things necessary, desirable or proper to carry out the terms of said plan and agreement, and directing the officers, directors, agents and employees of the Old Company to cooperate with and assist said petitioner and the New Company in the effectuation of said plan by the execution of such documents and the doing of such acts in connec-

799 tion therewith as might be requested of them by said petitioner. A copy of said plan and agreement is attached to the petition for approval thereof on file herein and by this reference the same is incorporated in this complaint in intervention as though fully set forth.

X.

On July 23, 1936, said petitioner filed in the within court a petition for approval of an amend-
800 ment to said plan and agreement and thereafter on the same day said court made and entered its order approving said amendment. A copy of said amendment is attached to said petition for an order approving the same and by this reference it is incorporated herein as though fully set forth.

XI.

Immediately upon the making of the orders hereinabove referred to said petitioner and the
801 New Company executed said plan and agreement and thereupon all of the assets of the Old Company, with the exceptions hereinabove referred to, were transferred and conveyed to the New Company and ever since that time said New Company has been and now is in the sole and exclusive possession thereof and said company has been and now is conducting the insurance and annuity business heretofore conducted by the Old Company.

802 XII.

The intervening shareholder is informed and believes and therefore alleges that all of the orders hereinabove in paragraphs VII, VIII and IX referred to were made concurrently and contemporaneously and without the lapse of any time other than the time required for the signing thereof; that no hearing or other proceeding in connection therewith was had by or before the 803 within court and that no evidence in connection therewith was presented to or heard by said court other than the allegations of the various applications and petitions hereinabove referred to. The intervening shareholder is further informed and believes and therefore alleges that at no time prior to or concurrently with the making of said orders, or prior to or concurrently with the making of the order hereinabove in paragraph X 804 referred to, was there presented to the within court, nor did the court have, any impartial or independent appraisals, data or information upon which to base a consideration and determination of the fairness, equity and legality of the proceedings herein taken and/or of said plan and agreement.

805 XIII.

At no time prior to or concurrently with the making of any of said orders was any notice thereof or of the proceedings for the procurement thereof given to any shareholder of the Old Company nor was any such shareholder ever given any right or opportunity to appear and be heard in or in connection with said proceedings and/or the making of said orders, or any of them. The consent of the shareholders of the
806 Old Company to said proceedings has never been requested or obtained nor has the consent of said shareholders or any of them to the aforesaid transfer and conveyance of assets ever been requested or obtained. In this connection the intervening shareholder alleges that the assets so transferred and conveyed to the New Company were and are substantially all of the assets of the Old Company and were all of the assets of said Old Company which at that time were being
807 or theretofore had been used in the conduct and operation of the business of said Old Company.

XIV.

The intervening shareholder is informed and believes and therefore alleges that at some time prior to July 22, 1936, the exact date being unknown to him, the directors of the Old Company, or some of them, acting in concert and collaboration with said petitioner formed a plan or design to eliminate the interests of the shareholders of

the Old Company in and to its business and assets, to create a new corporation which would take over and conduct and operate the assets and business of the Old Company, thereby to hinder, delay and defraud certain of the policy holders and creditors of said Old Company in the collection and satisfaction of their claims whereas other policy holders and creditors of said Old Company would be preferred in the collection and satisfaction of their claims; and agreed that in order to accomplish said plan and design proceeding substantially such as those which have been taken herein should be taken for the purpose of accomplishing said transfer of assets, delay and hindrance of some creditors and preference of others, and said elimination of the interests of the shareholders of the Old Company. The intervening shareholder is further informed and believes and therefore alleges that the proceedings had and taken herein have been and are but incidents in and a part of said preconceived plan and design.

XV.

The intervening shareholder is informed and believes and therefore alleges that the various findings and determinations of said petitioner as to the condition of the Old Company and the necessity for taking the various proceedings hereinabove alleged to have been taken were arbitrary and capricious and not supported by the facts in

811 that said Old Company was not at any of the times said proceedings were taken insolvent or in such condition that its further transaction of business would have been hazardous to its policy holders or creditors or to the public. The intervening shareholder is further informed and believes and therefore alleges that the finding and determination of said Commissioner that further efforts to proceed under section 1011 of the Insurance Code would be futile and not to the
812 best interests of its policy holders, creditors, stockholders and the public generally and that the interest of such persons would be served by granting an order of liquidation, were and are arbitrary and capricious, unfounded in fact, and made without any independent and impartial data or information to support them and without any attempt by said petitioner to manage, operate or conduct the business and affairs of said Old Company as conservator and without any at-
813 tempt on his part by such actual operation to determine whether conservation could be effected and liquidation avoided.

XVI.

The intervening shareholder further alleges that said purported Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement was and is unfair and inequitable and in violation and disregard of the rights of the shareholders of said Old Company in that said

814 plan does not preserve to said shareholders the full benefit of their interest in the assets and business of said Old Company remaining after the just claims of all policy holders and creditors have been paid and satisfied but on the contrary transfers and reserves for the benefit of said New Company substantially all of the interest remaining in the assets and business of the Old Company after allowance for the claims of policy holders and creditors; and further in that the
815 consideration agreed to be paid by the New Company for the Old Company's assets and business is grossly inadequate and substantially less than the fair value of said assets. Said plan and agreement is further unfair and inequitable and in violation and disregard of the rights of the shareholders of said Old Company in that as the intervening shareholder is informed and believes and therefore alleges no attempts were made prior to the consummation of said plan and
816 agreement to obtain any offers from others for the purchase of said assets and business or reinsurance of the policy holders of the Old Company or rehabilitation of the Old Company.

XVII.

By reason of the foregoing facts the proceedings had and taken, and the orders made and entered herein are and each of them is void, irregular, arbitrary and without authority in law, and said proceedings and orders are and

817 each of them is void and unconstitutional in that they deprive and have deprived the shareholders of said Old Company of their property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California, and further in that they impair and have impaired the obligation of the contracts of said 818 shareholders in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XVIII.

Further by reason of the foregoing facts the intervening shareholder alleges that the statute under and in pursuance of which the said pro- 819 ceedings and orders purport to have been taken and made, being article 14 of chapter 1 of part 2 of the Insurance Code of the state of California, is void and unconstitutional in so far as it authorizes and permits said proceedings and orders in that it deprives the intervening shareholder and all other shareholders of said Old Company of their property without due process of law, in violation of section 1 of article XIV of amend-

820 ments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California, and further in that it impairs and authorizes the impairment of the obligation of the contracts of said shareholders in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

821 Wherefore, the intervening shareholder, for himself and for and on behalf of all other persons similarly situated, prays that said purported Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement be not approved, that all proceedings had and taken and all orders heretofore made herein be vacated and set aside, that the intervening shareholder's costs incurred herein including a reasonable attorneys'
822 fee be allowed and that he have such other and further relief as to the court may seem proper.

LOEB, WALKER AND LOEB,
By HERMAN F. SELVIN,
Attorneys for Said Intervening Shareholder.

823 EXHIBIT A.

Protective Committee of Stockholders of
The Pacific Mutual Life Insurance Company of California,
Room 717 I. N. Van Nuys Building,
210 West Seventh Street,
Los Angeles, California.

Gentlemen:

I am the owner of.....shares of stock of
824 The Pacific Mutual Life Insurance Company of California.

In response to your letter dated August 3, 1936, signed by Messrs. Allan C. Balch, Ferdinand R. Bain, Harold S. Cook, Shannon Crandall and H. H. Wagenseller as a Protective Committee of the Stockholders of The Pacific Mutual Life Insurance Company of California, hereinafter referred to as the "old company", I hereby
825 designate and appoint as my attorney-in-fact the said committee as it now is or from time to time may be constituted, to take such steps as it may deem advisable to investigate the so-called "Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement" with Pacific Mutual Life Insurance Company, hereinafter referred to as the "new company", and to protect my interests as a stockholder of the old company.

826 Without limiting the effect of the foregoing general language, I hereby authorize my said attorney-in-fact to employ legal counsel and such other persons as in its judgment may be necessary, to conduct negotiations in my behalf and to protect my said interests by proceedings in court or otherwise, either in my name or in its name or in the name of others, all in such manner as the committee, in the exercise of its discretion, 827 may deem advisable, but the committee shall not, for me, approve any agreement for the rehabilitation and/or liquidation of the old company or any agreement for the sale and transfer of its assets or any agreement for the mutualization of the old company or of the new company or any agreement of reinsurance, without my prior approval.

I agree that the committee shall consist of the 828 persons named above and of such other persons as they may select to act with them either in addition to or to replace any such persons, that the committee will formulate its own rules of procedure and rules for the addition, removal and/or substitution of its members, and that the members of the committee will serve without compensation. I understand that the committee will act for other stockholders of the old com-

pany as well as for myself and since it will act without compensation I agree that it will have no liability to me except in the event of its own gross negligence.

I further agree to pay a pro rata proportion of the expenses incurred by the committee based upon the number of shares owned by me in relation to the whole number of shares of stock represented by the committee under similar powers of attorney, but subject to the express limitation that in no event, except with my express written consent, shall the expense to me, including attorneys' fees, exceed ten (10) cents for each share of stock owned by me.

Dated at....., ..., 1936.

.....

(Signature of Stockholder)

Please Print Name and Address Below.

.....

Address: .....

(Street and Number)

.....

(City) (State)

Telephone Number:.....

Verified.

Endorsed: Filed Aug. 10, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy.

D. 11

832 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner, etc., plaintiff, vs. Pacific Mutual Life Insurance Company of California, a corporation, defendant. No. 404-673.

Appearance of William Weisman and Return to the Order to Show Cause.

I.

833 Comes now William Weisman and makes his appearance herein as a respondent owning and holding a non-cancellable policy of insurance issued by The Pacific Mutual Life Insurance Company of California, and makes his return to the order to show cause as issued by the Honorable Douglas L. Edmonds, judge of this court, on the 23rd day of July, 1936.

II.

834 Your respondent, William Weisman, alleges that he is the owner and holder of non-cancellable policy No. 4616542 issued by The Pacific Mutual Life Insurance Company of California, a corporation, on the 7th day of April, 1921, to and in favor of your respondent William Weisman. That under the terms of said policy an annual premium is required to be paid by your respondent to The Pacific Mutual Life Insurance Company of California. Your petitioner alleges that he has paid said annual premium as and when

835 due, that said policy is in full force and effect, and was in full force and effect on the 22nd day of July, 1936, at the time of the filing of these proceedings herein.

III.

Your petitioner objects to the court making any order confirming and approving, or confirming or approving or ratifying the proposed plan by which the assets of The Pacific Mutual Life
836 Insurance Company of California, a corporation, have been transferred or are to be transferred to a new corporation known as Pacific Mutual Life Insurance Company; objects to the confirmation and approval of the execution and delivery of a deed and bill of sale by Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California transferring and setting over to Pacific
837 Mutual Life Insurance Company the assets of The Pacific Mutual Life Insurance Company of California, and objects to any order approving the terms and conditions upon which it is proposed to make said transfer, to confirm said transfer, to approve said transfer, to-wit, the rehabilitation, sale and transfer of assets and reinsurance plan and agreement as proposed July 22, 1936, by Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California.

838 IV.

For ground of said objection your respondent alleges that The Pacific Mutual Life Insurance Company of California was, on the 31st day of December, 1935, and has been at all times since said date, insolvent, and that it had been advised by its actuaries for several years prior to December 31, 1935, that it could not continue to write non-cancellable policies at the premium which it was then and thereafter charging to the policy-
839 holder. That there is a deficiency, as your petitioner is informed and believes and therefore alleges, of approximately $23,000,000. That the eight directors of the old company, The Pacific Mutual Life Insurance Company of California, who for several years past have directed the destinies and policies of said company, are now the directors purportedly selected by Samuel L. Carpenter, Jr., to be the directors of the new Pacific Mutual Life Insurance Company, the
840 company alleged to have been formed by Samuel L. Carpenter, Jr., and to whom he is proposing to transfer and sell the assets of the old company.

V.

That the Insurance Commissioner has attempted to act and is acting arbitrarily and capriciously and in disregard of the established rules of law, and proposes by the said transfer and by the proposed application to transfer to

841 obtain the judicial sanction and approval of this court to an arbitrary act, an act which will deprive your petitioner and the other persons, policyholders of the same class, of their contract rights without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States. That the proposed act of Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California will, if confirmed by this court, deprive your petitioner
842 of his property without due process of law and will deprive thousands of other persons similarly situated of their property without due process of law and without notice and without affording the class of which this respondent is one, their day in court.

VI.

Petitioner alleges that the proposed plan, if carried out, would in effect transfer all of the assets of the old company, The Pacific Mutual
843 Life Insurance Company of California, together with the reserves created for the benefit of each class of policyholder, together with the reserve created for non-cancellable income policies, of which your petitioner is one, to the new corporation, Pacific Mutual Life Insurance Company. That the new company does not propose to be bound by the terms of the policies held by your petitioner and other policyholders similarly situated, but does propose to take the reserves for

844 the benefit of such holders of the non-cancellable income policies as may agree to the terms which are stated in the proposed plan. That under the terms of said proposed plan the policy of your petitioner and the other non-cancellable income policyholders are destroyed, the terms of the policies are changed, and in the event your petitioner does not consent to such destruction and change then your petitioner is left without a remedy, and the court by the proposed order can-
845 cels the policy of your petitioner and performs and does an act at the request and instance of The Pacific Mutual Life Insurance Company of California which it, the said company, could not under the terms of its agreement with your petitioner, do. That under the terms of the agreement between your petitioner and The Pacific Mutual Life Insurance Company of California the policy is, as to your petitioner, non-cancellable. That your petitioner and others in the same class
846 have created a trust fund known as a reserve; that said funds are held in trust and were held in trust by The Pacific Mutual Life Insurance Company of California, and of said trust your petitioner and others of the same class are beneficiaries. The proposed plan attempts to create different terms, different beneficiaries, the elimination of part of the beneficiaries, the ignoring of the rights of the beneficiaries, and the transfer of said trust funds to a new and different trustee, Pacific Mutual Life Insurance Company,

847 without the consent and against the will of the beneficiaries including your petitioner.

VII.

This respondent alleges this court is without jurisdiction to alter, vary and amend the terms of his contract or the terms of his non-cancellable income policy. That this court is without jurisdiction to vary the terms of his contract and/or to place beyond the reach of and the benefit of your petitioner the trust fund created under the
848 terms of his contract for his and the benefit of others similarly situated. Your petitioner alleges this court is without jurisdiction and it is contrary to law to transfer and give to others funds held in trust for the benefit of your petitioner and others similarly situated.

VIII.

Petitioner alleges that it is unjust, inequitable and an arbitrary act of the Corporation Commis-
849 sioner, not authorized or justified by the law or the facts, and the confirmation of the proposed agreement would do great, serious and irreparable injury to your petitioner. Petitioner alleges that because of his increased age, to-wit, the elapse of time from the making of his original non-cancellable income policy as hereinbefore set forth and the present date, a period of sixteen years, and because of the change of his condition of health, to-wit, your petitioner alleges he is in much poorer and impaired health than he was at

the time of the taking out of said policy (your petitioner being in good and sound health at the time of the issuance of said policy), that petitioner is unable to obtain insurance of the same type from any other existing insurance company and will continue to be unable to obtain a similar policy or similar insurance elsewhere throughout the world. That because of the increase of age and a change in physical condition your petitioner, if he were able to obtain insurance, would be compelled to pay an exorbitant and impossible premium therefor. Petitioner alleges that he has a vested and fixed right in and to the reserves created by him and by persons holding policies of the same type in the non-cancellable group.

Wherefore, your petitioner prays, on behalf of himself and all other persons similarly situated, that the court deny the petition of Pacific Mutual Life Insurance Company, and that the court make such other and further order as is meet in the premises.

RUPERT B. TURNBULL,
Attorney for William Weisman.

Verified.

Endorsed: Received copy of the within document Aug. 10, 1936. O'Melveny, Tuller & Myers, by (Invalid unless Countersigned) attorney for .....

Filed Aug. 10, 1936, 12:08 p. m. L. E. Lampton, county clerk; by C. H. Holdredge, deputy.

853 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent, Pacific Mutual Life Insurance Company, intervenor. No. 404,673.

Objections to Jurisdiction of Court in Matter of Transfer of Assets and Objections to Rehabilitation Plan.

854 In accordance with the order of court herein, made on July 23, 1936, entitled "Order Permitting Intervention and Order to Show Cause," now comes the intervener, Roscoe R. Hess, in his own person and respectfully alleges, represents and objects, by way of objection to the proposed order mentioned in paragraph 2 of said order to show cause, to-wit:

I.

855 That this intervener is the owner and holder of two "Non-Can Policies," as said term is defined in the proposed agreement referred to in said paragraph 2, which policies are in full force and effect and are numbered and dated, as follows:

No. 461,0222, dated June 1, 1921
No. 4619043, dated July 21, 1921.

That intervener has a contingent claim against the "Old Company," contingent upon the payment of premiums on said policies according to

856 their terms, and the happening of events and disabilities therein mentioned.

II.

That intervener objects to and denies the jurisdiction of the court with respect to the matters referred to in subdivisions (a), (b), (c) and (d) of said paragraph 2 of said order to show cause, upon the following grounds:

1. That article 14 of the Insurance Code of the state of California is invalid and uncon-
857 stitutional and a violation of the Fourteenth Amendment to the Constitution of the United States in that it constitutes a taking of property without due process of law, and of section 10 of article I of the Constitution of the United States in that said article of said code is a law impairing the obligation of contracts, in the following particulars:

The provision thereof for the transfer of as-
858 sets of an insurance company to the commissioner mentioned in section 1016 thereof, coupled with the provision making said commissioner the statutory successor thereof, as set forth in section 1017 thereof, coupled with the provision authorizing the transfer of such assets by the commissioner as set forth in sections 1037 and 1043 thereof, coupled with the failure of said Act to provide any legally adequate remedy upon, or method of enforcement of, contracts entered into by policy holders with such insurance company, materially affect the obligation of the con-

tract, by so far altering and impairing the remedy thereon as to render the right scarcely worth pursuing, with the result thereby of impairing the obligation of the contract itself, within the meaning of the said constitution.

That in particular, although provision is made in said Act for the filing of claims by policy holders upon the insolvency or liquidation of such insurance company, no provision is made therein for reaching any property of the debtor as the same existed at the time the contract was made, and the transfer of the assets of the debtor through the commissioner as a conduit or channel to a transferee which is not required to assume the obligation of such contract, operates in practical effect as an extinguishment thereof, and a taking of property without due process. That in addition, no provision is made for the enforcement of any adequate remedy upon any contract with such insurance company in insolvency or in liquidation as against the commissioner during the period that he is the statutory successor of such insurance company, or as against any company to which the assets of such insurance company may have been transferred under any plan of rehabilitation mentioned in section 1043 or as implied under section 1037.

III.

That for the reasons hereinabove set forth, the action of the commissioner in purporting to

862 transfer the assets of the old company to the new company, and any order of the court in so approving such proposed transfer is thereby in violation of the constitutional rights of this intervener.

IV.

That no provision is made in the said Rehabilitation Agreement itself for adequate enforcement of the contract rights of this intervener inasmuch as none of the assets of the old
863 company can, under the agreement, be subjected to process upon any remedy that may be obtained on such contract rights of this intervener, and that no reasonably efficient remedy remains (irrespective of whether the Insurance Code itself provides for any such reasonably efficient remedy).

V.

That in effect the Rehabilitation Agreement accomplishes the result of complete liquidation
864 of the obligations of the old company without any equitable distribution of the assets thereof among the creditors of the old company, and without any assignment of such assets for the common benefit of all such creditors.

VI.

That paragraph 8 of the Rehabilitation Agreement is unfair to this intervener in that the restoration of monthly disability benefits from net profits derived by the new company is entirely subject to the will and caprice of the new

865 company both as to extent, manner and time of application of such net profits, free from any liability whatsoever for any further restoration of benefits to holders of Non-Can policies.

VII.

That the limitation in the second paragraph of paragraph 15 of said Rehabilitation Agreement is unfair to this intervener in that at the end of the ten year period, to-wit, on January 1, 1947, the fund of $10.00 per $1,000 of non-participat-
866 ing life insurance then existing that would be assumed under the Rehabilitation Agreement would be an amount so small, due to the payment in part of such non-participating life insurance policies that would by their own terms mature during the intervening period, and due to death claims in the said period, as to accomplish only a negligible restoration of benefits on Non-Can policies and quite disproportionate to the necessary reserves for full payment of Non-
867 Can benefits if the figure of the commissioner therefor, of over $25,000,000.00 is anything but a matter of speculation on the part of the commissioner.

ROSCOE R. HESS,
ROSCOE R. HESS,
Intervener, in Pro. Per.

Endorsed: Filed Aug. 10, 1936, 1:57 p. m. L. E. Lampton, county clerk; by C. J. Bergquist, deputy.

868 [TITLE OF COURT AND CAUSE.]

Return and Answer of Harold S. Cook to Order to Show Cause.

Harold S. Cook, a shareholder of The Pacific Mutual Life Insurance Company of California, for himself, and for and on behalf of all other persons similarly situated who desire to avail themselves of such representation and share the cost thereof, hereby appears in response to the
869 order to show cause heretofore issued herein, and as cause why the proposed order therein specified should not be made alleges and specifies the following, to-wit:

I.

Article 14 of chapter 1 of part 2 of the Insurance Code of the state of California, in pursuance and under the authority of which the within proceedings purport to have been and to be taken, is void and unconstitutional in that
870 said article 14 takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

II.

Said Article 14 is further void and unconstitutional in that it impairs and authorizes a public officer of the state and the courts of the state

871 to impair the obligation of contracts in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

III.

Section 1011 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the tak-
872 ing of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

IV.

Said section 1011 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the
873 state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

V.

Section 1016 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the

874 taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

VI.

Said section 1016 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in
875 violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

VII.

Section 1017 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the
876 taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

VIII.

Said section 1017 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in

877 violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

IX.

Section 1020 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the
878 taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

X.

Said section 1020 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the
879 state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XI.

Section 1021 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the

taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XII.

Said section 1021 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XIII.

Section 1037 of said Insurance Code, and each separate subdivision or paragraph thereof, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XIV.

Said section 1037, and each separate subdivision and paragraph thereof is further void and unconstitutional in that it impairs, and author-

883 izes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XV.

Section 1043 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to
884 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XVI.

Said section 1043 is further void and unconstitutional in that it impairs, and authorizes a
885 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XVII.

Section 1045 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to

886 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XVIII.

Said section 1045 is further void and unconstitutional in that it impairs, and authorizes a
887 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XIX.

Section 1046 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to
888 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XX.

Said section 1046 is further void and unconstitutional in that it impairs, and authorizes a

889 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXI.

Section 1047 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to
890 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XXII.

Said section 1047 is further void and unconstitutional in that it impairs, and authorizes a
891 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXIII.

Section 1048 of said Insurance Code, in pursurance and under the authority of which the within proceedings, or some of them, purport to

892 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XXIV.

Said section 1048 is further void and unconstitutional in that it impairs, and authorizes a
893 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXV.

Section 1049 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to
894 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XXVI.

Said section 1049 is further void and unconstitutional in that it impairs, and authorizes a

895 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXVII.

Section 1050 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport 896 to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XXVIII.

Said section 1050 is further void and unconstitutional in that it impairs, and authorizes a 897 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXIX.

Section 1051 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to

898 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XXX.

Said section 1051 is further void and unconstitutional in that it impairs, and authorizes a
899 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXXI.

Section 1052 of said Insurance Code, in pursurance and under the authority of which the within proceedings, or some of them, purport to
900 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XXXII.

Said section 1052 is further void and unconstitutional in that it impairs, and authorizes a

901 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXXIII.

Section 1053 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to
902 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XXXIV.

Said section 1053 is further void and unconstitutional in that it impairs, and authorizes a
903 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXXV.

Section 1054 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to

904 have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XXXVI.

Said section 1054 is further void and unconstitutional in that it impairs, and authorizes a
905 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXXVII.

Section 1058 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport
906 to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XXXVIII.

Said section 1058 is further void and unconstitutional in that it impairs, and authorizes a

907 public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XXXIX.

The proceedings had and taken by the Insurance Commissioner and by the within court herein are void and unconstitutional in that they
908 deny and have denied due process of law to the shareholders of said The Pacific Mutual Life Insurance Company of California, in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XL.

Said proceedings hereinabove in paragraph XXXIX referred to are further void and un-
909 constitutional in that they impair and have impaired the obligation of the contracts of said shareholders in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XLI.

The purported order appointing conservator made and entered herein on July 22, 1936, is void and unconstitutional in that it takes and

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910 authorizes the taking of property without due process of law, in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XLII.

Said purported order is further void and unconstitutional in that it impairs and authorizes the impairment of the obligation of the contracts of said shareholders, in violation of section 10 911 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

XLIII.

The purported order of liquidation made and entered herein on July 22, 1936, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law, in violation of section 1 of article XIV of 912 amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California.

XLIV.

Said purported order of liquidation is further void and unconstitutional in that it impairs and authorizes the impairment of the obligation of the contracts of said shareholders, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Constitution of the state of California.

913 XLV.

The purported order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of The Pacific Mutual Life Insurance Company of California is void and unconstitutional in that it takes and authorizes the taking of property without due process of law, in violation of section 1 of article XIV of amendments to the constitution of the United States and of section
914 13 of article I of the Constitution of the state of California.

XLVI.

Said purported order hereinbefore in paragraph XLV referred to is further void and unconstitutional in that it impairs and authorizes the impairment of the obligation of the contracts of said shareholders, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the con-
915 stitution of the state of California.

XLVII.

The purported order approving amendment of rehabilitation, sale and transfer of assets and reinsurance agreement made and entered herein on July 23, 1936, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law, in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section

916 13 of article I of the Constitution of the state of California.

XLVIII.

Said purported order hereinabove in paragraph XLVII referred to is further void and unconstitutional in that it impairs and authorizes the impairment of the obligation of the contracts of said shareholders, in violation of section 10 of article I of the Constitution of the United States and of section 16 of article I of the Con-
917 stitution of the state of California.

XLIX.

The acts and proceedings of said Insurance Commissioner in proposing, agreeing to, executing and procuring the approval of the purported Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement referred to in the order to show cause herein were and are, and each of them was and is, void and unconstitutional in that they deprive and have deprived the
918 shareholders of said The Pacific Mutual Life Insurance Company of California of their property without due process of law, in violation of section 1 of article XIV of amendments to the Constitution of the United States and of section 13 of article I of the Constitution of the state of California; and further in that they impair and have impaired the obligation of the contracts of said shareholders in violation of section 10 of article I of the Constitution of the United States

919 and of section 16 of article I of the Constitution of the state of California.

L.

The proceedings had and taken herein were and are void, irregular, arbitrary and without authority in law, in that:

(a) No notice of any of said proceedings, or of the application for, or the making of, any of the orders hereinabove referred to was given to any of the shareholders of The Pacific Mu-
920 tual Life Insurance Company of California;

(b) None of said shareholders was given the right or opportunity to appear and be heard in respect of the action taken and/or proposed to be taken by the said Insurance Commissioner and/or by the within court;

(c) None of said shareholders was given the right or opportunity to appear and be heard in respect of the making, execution and/or ap-
921 proval of said purported Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement referred to in the order to show cause herein;

(d) None of said shareholders was given the right or opportunity to secure, attempt to secure, present and/or propose other and different plans or agreements of rehabilitation, reinsurance, sale and transfer of assets or reorganization;

922 (e) The order approving the purported Rehabilitation, Sale and Transfer of Assets and Reinsurance referred to in the order to show cause herein, and the order approving amendment thereto, were and each was made improvidently, without a full or any hearing, without notice or opportunity for hearing to any of the shareholders, and without the presentation and consideration of such independent and impartial appraisals, information and data as would have en-
923 abled the court to form a considered and informed judgment upon the merits of said purported plan and agreement;

(f) The said Insurance Commissioner was and is without authority in law to sell, transfer or otherwise dispose of all or substantially all of the assets of said The Pacific Mutual Life Insurance Company of California without the approval and consent of shareholders owning at least a majority of the outstanding capital stock
924 of said company, and without notice and opportunity for a hearing in respect thereof being given the said shareholders;

(g) The within court was and is without power or jurisdiction to order or approve, confirm or ratify the sale, transfer or other disposition of all or substantially all of the assets of said company without notice or opportunity for a hearing in respect thereof having been given the shareholders of said company;

925 (h) The said Insurance Commissioner was and is without any authority or power in law to make or execute said purported Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement referred to in the order to show cause herein, and the within court was and is without power or jurisdiction to order or approve, confirm or ratify said plan and agreement;

(i) The said Insurance Commissioner has no
926 right, power or authority in law to use all or any part of the assets of said The Pacific Mutual Life Insurance Company of California to purchase stock in any other corporation, firm or concern;

(j) As the respondent hereby appearing is informed and believes and therefore alleges, said The Pacific Mutual Life Insurance Company of California at the time of any of the proceedings had and taken by said Insurance Commissioner
927 and the within court, was not insolvent or in such condition that its further transaction of business would have been hazardous to its policyholders, or creditors, or to the public; and the finding and determination of said Insurance Commissioner to the contrary were and are arbitrary and capricious and not founded or based on fact;

(k) As respondent hereby appearing is informed and believes and therefore alleges, the

finding and determination of said Insurance Commissioner to the effect that he will be unable to restore the business, affairs and property of said The Pacific Mutual Life Insurance Company of California to such a position that it will be able to carry on its business as heretofore, maintain its necessary reserves and discharge in full its obligations to policyholders and others as they mature, that further efforts to proceed under section 1011 of the Insurance Code would be futile and not to the best interests of its policyholders, creditors, stockholders and the public generally, and that the interests of such persons would be best served by granting an order of liquidation, were and are arbitrary and capricious, unfounded in fact and made without any independent or impartial data or information to support them and without any attempt by said Insurance Commissioner to manage, operate or conduct the business and affairs of said company as conservator and without any attempt by such actual operation to determine whether conservation could be effected and liquidation avoided;

(l) The finding of the within court in accordance with the finding and determination of the Insurance Commissioner hereinabove in subdivision (k) referred to, was and is without support in any evidence, data or information before the court;

931 (m) The finding numbered "1" in the Order Permitting, Approving and Authorizing Rehabilitation, etc., was and is without support in any evidence, data or information before the court and is contrary to the facts;

(n) The finding numbered "2" in said order was and is without support in any evidence, data or information before the court and is contrary to the facts;

(o) The finding numbered "3" in said order
932 was and is without support in any evidence, data or information before the court and is contrary to the facts;

(p) The finding contained in the Order Approving Amendment of Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement is without support in any evidence, data, or information before the court and is contrary to the facts;

933 (q) As the respondent hereby appearing is informed and believes and therefore alleges, the within proceedings are but an incident in and a part of a preconceived plan and design on the part of the directors of said The Pacific Mutual Life Insurance Company of California, acting in concert and collaboration with said Insurance Commissioner, to convey and transfer all of the assets of said company to a new corporation for the purposes of eliminating the interest therein of the shareholders of the original company, and

934 of defrauding, hindering, and delaying certain creditors and preferring others.

LI.

Said purported Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement referred to in the order to show cause herein and the purported amendment thereof, are unfair and inequitable and in violation of the rights of the shareholders, among others, of said The Pacific Mutual Life Insurance Company of
935 California, in the following particulars, among others, and in each of them, to-wit:

(a) All or substantially all of the assets of the said company (hereinafter referred to as the "Old Company") are transferred to the so-called "New Company", but neither non-cancellable policy holders, creditors nor shareholders participate or are to participate in the realization from any but a small part of said assets;

936 (b) The New Company does not assume all of the liabilities of the Old Company, but it acquires all of the latter's assets;

(c) The purported agreement for restoration of benefits to non-cancellable policy holders is illusory, unfair and inequitable in that: 1. Such restoration is to be made only at such time or times, and in such manner and to such an extent as may be proposed by the New Company and approved by the Insurance Commissioner, so that the agreement may never be performed and

937 could never be enforced; 2. The fund out of which said restoration, if any, is to be made is unduly limited to the net profits derived by the New Company from that portion of the non-participating branch of its life department represented by non-participating life insurance policies reinsured and assumed, whereas such policyholders, and thereafter the shareholders, should have the benefit of all profits made by the New Company from all assets transferred to, and all
938 insurance reinsured and assumed by, the New Company;

(d) The assets of the Old Company are taken over at their admitted values as of December 31, 1935, whereas said assets are in fact of a value considerably in excess thereof by reason of the conservative appraisal of admitted values, and the general appreciation in values since December 31, 1935. Any realization by reason of such appreciation in excess of admitted values
939 is reserved to the New Company and shareholders do not participate therein or obtain the benefit thereof;

(e) The provision for payments to the Old Company, in which non-cancellable policy holders and thereafter shareholders participate, is unduly limited to payments out of the net profits derived by the New Company from that portion of the non-participating branch of its life insurance policies reinsured and assumed, whereas

940 such policy holders, and thereafter the shareholders, should have at least the benefit of all profits made by the New Company from all assets transferred to, and all insurance reinsured and assumed by, the New Company;

(f) The limited sources to which payments to be made for the benefit of shareholders are limited, are uncertain in nature and may very probably soon cease to exist because of: 1. The lapse and discontinuance of non-participat-
941 ing policies reinsured and assumed by the New Company; 2. The conversion of the reinsured and assumed non-participating policies into participating policies; 3. The limitations on the use, and deductions from, the fund so created by virtue of the provisions requiring establishment of reserves for any depreciation in the assets, and the restoration of certain sums to the surplus of the participating department, and the retention by the New Company of the benefit
942 of reserves freed by a lapsation of non-cancellable policies in excess of a lapse rate of ten per cent (10%) per year;

(g) The name, good-will and agency structure of the Old Company are transferred to the New Company, but nothing is paid in respect thereof and there is no provision for participation by the shareholders in the new business acquired or profits made by the New Company as the result of the acquisition and use of these assets;

943 (h) The assumption by the New Company of claims against the Old Company is unfairly and unduly limited to aggregate admitted value of the transferred assets as of December 31, 1935, thereby adopting a low value and depriving the shareholders of the benefit of any appreciation in such value;

(i) The agreement by the Insurance Commissioner as to the manner in which he will vote the stock of the New Company in the future in 944 respect of a proposed voluntary mutualization is contrary to public policy and void;

(j) The purchase price to be paid for the stock of the New Company held by the Insurance Commisisoner in the event of a voluntary mutualization is not devoted, in proper order, for the benefit of the shareholders of the Old Company; on the contrary, any surplus after payment of claims against the Old Company is to be repaid to the New Company;

945 (k) The proposed Plan and Agreement is uncertain, vague and ambiguous in many particulars so that its intent and meaning cannot be determined;

(l) The shareholders, who had no part in the negotiation, drafting or preparation of said Plan and Agreement and who are objecting to its terms and provisions, are nevertheless bound, in the event of any dispute, by the decision of one

946 of the parties to it and apparently without recourse to the courts;

(m) The provision making the agreement a complete and adequate defense to any action by the shareholders, is unfair, contrary to public policy, and destructive of the right to have disputes and controversies thereunder and rights affected thereby adjuciated by the courts.

(n) The provision for the creation of a fund based on the amount of assumed and reinsured
947 non-participating insurance in force at the time of creation is illusory and unfair in that there is no limitation on the time within which the fund may be created, and the basis upon which the amount of said fund is to be computed may never exist because of the lapse and discontinuance and maturity of non-participating policies and their conversion into participating policies either by agreement with the individual policy holders or by voluntary mutualization;

948 (o) The consideration agreed to be paid by the New Company to the Old Company for the latter's assets is grossly inadequate and less than the fair value of said assets.

Wherefore, respondent hereby appearing respectfully prays, on his behalf and on behalf of all persons similarly situated, that all proceedings heretofore had herein be vacated and set aside, that said purported Plan and Agreement

949 be not approved, confirmed or ratified, or that in the alternative, said Plan and Agreement be amended and modified so as to make it fair and equitable, and for such other and further relief as to the court may seem proper.

LOEB, WALKER AND LOEB,
By HERMAN F. SELVIN,
Attorneys for Harold S. Cook.

State of California, County of Los Angeles—ss.

950 Harold S. Cook being by me first duly sworn, deposes and says: that he is the respondent appearing by the foregoing return & answer in the above entitled action; that he has read the foregoing return & answer and knows the contents thereof; and that the same is true of . . . . own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

HAROLD S. COOK.

951

Subscribed and sworn to before me this 10th day of August, 1936.

[Seal] LAURA LINDSAY.
Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed Aug. 10, 1936. L. E. Lampton, county clerk; by A. G. Stanhani, deputy.

D 11

952 [TITLE OF COURT AND CAUSE.]

Petition for Intervention.

Comes now R. Rabinowitz, and for his petition in intervention alleges:

I.

That intervenor is and at all times herein mentioned has been the holder and owner of the following policies of insurance heretofore issued by respondent herein, to-wit:

953 1. Policy No. 4641785 (Noncancellable Disability Policy) issued September 14, 1923.
2. Policy No. 4643430 (Noncancellable Disability Policy) issued November 19, 1923.
3. Policy No. 4670940 (Noncancellable Disability Policy) issued July 8, 1926.
4. Policy No. 384061 (Life Insurance with disability provisions) issued March 26, 1928.

II.

954 That on July 22, 1936, each of said policies of insurance hereinabove described was in good standing.

III.

That prior to July 22, 1936, intervenor became ill and as a result of such illness did suffer such disability as to entitle him to compensation under and pursuant to the terms and provisions of said policies of insurance and each of them. That said illness and disability of your intervenor did commence prior to the 22nd day of July, 1936,

955 and at all times since the inception thereof did continue to exist and does now exist.

IV.

That paragraph 10 of the "Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Concerning The Pacific Mutual Life Insurance Company of California" (hereinafter referred to as the "Rehabilitation Agreement") and the amendment thereto provides:

"The New Company shall be obligated to con-
956 tinue the payment of all disability benefits under Non-Can Policies, claims or notices of claims for which had been filed with the Old Company prior to the date of liquidation, and all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to any such settlement agreements; and subject, further, to
957 any and all defenses, offsets, counter-claims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company had this agreement not been made."

V.

That while no formal written claim or formal written notice of claim was filed with respondent by assured himself before July 22, 1936, the illness and disability of intervenor, as above described, did occur prior to said date and

958 your intervenor's right to compensation under and pursuant to the terms and provisions of said policies and each of them did accrue, arise and mature prior to said date.

VI.

Your intervenor avers that said "Rehabilitation Agreement" is unjust, unfair, inequitable and discriminatory in providing that the New Company shall be obligated to continue the payment of disability benefits, under non-cancellable
959 policies, only when claim or notice of claim was filed thereon prior to July 22, 1936, and in failing to provide that the New Company should likewise be obligated to make payment in full of all disability benefits under non-cancellable policies where the illness and disability of the assured did commence prior to said date and where the right to compensation under and pursuant to the terms and provisions of such policies did arise and become vested prior to said date.

960 VII.

That in so discriminating against the holders of policies of insurance whereunder the right to compensation did arise, become vested and mature prior to July 22, 1936, said "Rehabilitation Agreement" and the order of the above entitled court confirming the same under date of July 22, 1936, are and each is in violation of the Fourteenth Amendment of the Constitution of the United States and of section 13 of the Constitution of the State of California.

961 VIII.

Your intervenor does file this petition for and on behalf of himself and all other holders of policies of insurance issued by respondent under and pursuant to the terms of which such persons did become entitled to the compensation and payments therein provided and who did not, prior to July 22, 1936, file claim or notices of claim with respondent.

Wherefore, your intervenor prays:

962 1. That this court grant to your intervenor leave to intervene herein as a party defendant and to file herein this his said petition;

2. That this court make its order disapproving paragraph 10 of the "Rehabilitation Agreement" and requiring that said paragraph 10 be revised so as to require and obligate the New Company to pay and continue to pay all disability benefits under all non-cancellable policies where the assured therein did become ill and 963 disabled prior to July 22, 1936, in such manner as to be entitled to compensation and payment thereunder regardless of whether claim or notice of claim for such compensation was filed with respondent prior to July 22, 1936.

R. RABINOWITZ,
By LAWLER & FELIX,
His Attorneys.

Verified.

Endorsed: Filed Aug. 11, 1936. L. E. Lampton, county clerk: By A. G. Stanham, deputy.

964 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404-673.

Order Appointing Conservator and Restraining Order.

965 It appearing that on the 22nd day of July, 1936, the petitioner in the above entitled proceeding filed herein an application for an order appointing the Insurance Commissioner of the State of California as conservator of respondent corporation, and for other relief, and that on [Willis, J.] said date ~~and pursuant to~~ the appearance and [Willis, J.] were d answer of respondent corporation ~~on~~^ file^ 966 herein and its written consent waiving notice [W. J.] d of the time and place of hearing ~~on~~ file^ herein; and it further appearing that thereafter and under date of July 22, 1936, an "Order Appointing Conservator and Restraining Order" was duly given and made by the Honorable Douglas L. Edmonds, Judge of the above entitled court, which, among other things, by its terms vested title to all of the assets of said respondent wheresoever situated in said Commissioner, or his suc-

cessor in office, in his official capacity as such Commissioner, directed said Commissioner forthwith to take possession of all of the books, records, property, real and personal, and assets of said respondent and to conduct, as Conservator, the business of said respondent and enjoined said respondent and its officers, directors, agents, servants and employees from the transaction of the business of said respondent and from the disposition of any of the property of said respondent until the further order of the above entitled court; and

It further appearing that the Honorable Douglas L. Edmonds ~~having~~ [W. J.] advised this court that he is the holder of a life policy in the sum of $5,000, issued by the respondent, that he has not and does not now consider that said facts disqualifies him in connection with this proceeding; that, nevertheless, it has occurred to him that it may hereafter be asserted that by reason of his ownership of such policy he was and is disqualified herein; and it appearing to this court that it is advisable that this court should re-hear and re-consider the petitioner's application on file herein, and petitioner having presented his said application to this court, and the court being fully advised in the premises,

The court finds that petitioner herein, together with a number of other insurance commissioners of the states in which respondent corpora-

970 tion transacts its business, made a convention examination of the business and affairs of respondent corporation as of December 31, 1935, and in connection therewith petitioner and said other Commissioners have joined in a report of such examination, which said report is petitioner's last report of examination of respondent, and a certified copy of which said report is attached to said application dated July 22, 1936,
971 as Exhibit A thereof; that said application, examination and report, and each of them, shows and the court finds the fact to be that respondent corporation is in such condition that its further transaction of business will be hazardous to its policyholders, its creditors and to the public; that said application, examination and report, and each of them, shows and the court finds the fact to be that the respondent corporation is insolvent
972 within the meaning of Article 13, Chapter 1, Part 2, Division 1 of the Insurance Code of the State of California; that respondent's said hazardous and insolvent condition is principally caused, among other things, by reason of the fact that respondent corporation has for a considerable number of years last past issued a large number of non-cancellable accident and health policies at a premium rate which was and is now

973 entirely inadequate to maintain the reserves required by law to mature said policy obligations,

Now, therefore, it is hereby ordered, adjudged and decreed, as follows:

1. That the "Order Appointing Conservator and Restraining Order" made herein by the Honorable Douglas L. Edmonds, under date of July 22, 1936, be and it is hereby ratified, approved and confirmed; and that said order and
974 said restraining order be and they are now hereby adopted and continued in force.

2. That Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, be and he is hereby appointed conservator of said respondent corporation, its business, assets and affairs, and that said Commissioner be and he is hereby ordered to take possession forthwith of all the books, records, property, real and per-
975 sonal, and assets, wheresoever situated, of said respondent corporation, and to conduct, manage, transact and operate the business and affairs of respondent as a going insurance business, and to do any and all things which the petitioner may deem necessary and appropriate for that purpose, for the benefit of the policyholders, creditors and stockholders of respondent corporation and the public in general.

976 3. That all the right, title and interest of said respondent corporation in and to all of its assets and property, whether real or personal, wheresoever situated, be and they are hereby vested in petitioner in fee simple; that all persons be and they are hereby enjoined and restrained from in any manner interfering with the possession and title of said petitioner in and to said assets and property, whether real or personal and
977 wheresoever situated; that in the conservation, management and operation of the assets and business of respondent corporation, petitioner deal with its property, assets and business as such conservator [Willis, J.] ~~in his own name as Insurance Commissioner of the State of California~~; that in such connection petitioner appoint and employ such agent or agents, counsel, clerks and assistants as by him
978 may be deemed necessary and fix their compensation.

4. That the above named respondent corporation, its officers, directors, agents, servants and employees be and they hereby are enjoined and restrained from the transaction of any of the business of said corporation or from the disposition of any of its property or assets until the further order of this court.

979 5. That the above named respondent corporation, its officers, directors, agents, servants and employees, all creditors of said respondent corporation, all claimants against said respondent corporation and all other persons be and they hereby are enjoined and restrained from interfering with the conservation, management, operation or disposal of any of the assets of or the business of respondent corporation or from in-
980 stituting or prosecuting any action, suit or proceeding or from levying any attachment or execution or other process or selling under or prosecuting any attachment or execution or other process against any property or assets of said respondent corporation, wheresoever situated, without the consent of this court obtained after reasonable notice to petitioner.

6. That all officers, directors, agents, servants
981 and employees of respondent corporation be and they hereby are ordered and directed to deliver to petitioner all books, records, fixtures, equipment, money, bills receivable and other property and assets of said respondent corporation, wheresoever situated.

7. That Samuel L. Carpenter, Jr., as conservator of respondent corporation, be and he is hereby authorized and directed to formulate,

work out and prepare a rehabilitation and/or re-
982 insurance plan or agreement concerning respondent corporation which shall be subject to the approval of this court and which shall in his judgment fairly and equitably protect and adjust the rights, obligations and liabilities of all persons concerned herein and which shall provide for the removal of the causes and conditions which have made this proceeding necessary; and he is fur-
983 ther authorized and directed to pay from the assets of respondent corporation all expenses necessarily incurred.

8. This order does not constitute any revocation or abrogation of any orders heretofore made in this proceeding and does not constitute any ruling or adjudication with respect to the effect of the ownership of said policy upon the right of the Honorable Douglas L. Edmonds to sit or act
984 or make any of the orders heretofore made by him herein.

Done in open court this 11th day of August, 1936.

HENRY M. WILLIS,
Judge of the Superior Court.

Endorsed: Filed Aug. 11, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy.

985 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioned of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent, Pacific Mutual Life Insurance Company, intervenor, Charles Ross Cooper, Irving H. Granicher, Raymond Vincent Knowles, Harry George Richard, Wilmont P.
986 Rogers, John F. Hassler, Verne Reynolds Pentecost, Donald Vincent Nicholson, Horace Rowan Gaither and Hugh King McKevitt, intervenors. No. 404673.

Petition in Intervention and Appearance of Certain Policyholders of the Pacific Mutual Life Insurance Company of California.

987 Come now Charles Ross Cooper, Irving H. Granicher, Raymond Vincent Knowles, Harry George Richard, Wilmot P. Rogers, John F. Hassler, Verne Reynolds Pentecost, Donald Vincent Nicholson, Horace Rowan Gaither and Hugh King McKevitt, owners and holders of non-cancellable income policies of The Pacific Mutual Life Insurance Company of California, and appear in the above entitled matter and intervene therein, and as and for such appearance

988 and petition in intervention, specify and allege as follows:

1. That said Charles Ross Cooper is the owner and holder of non-cancellable income policy numbered 2659704 issued by The Pacific Mutual Life Insurance Company of California under date of May 29th, 1919;

That said Irving H. Granicher is the owner and holder of non-cancellable income policy num-
989 bered 5513638 issued by The Pacific Mutual Life Insurance Company of California under date of April 15th, 1928;

That said Raymond Vincent Knowles is the owner and holder of non-cancellable income policy numbered 5513673 issued by The Pacific Mutual Life Insurance Company of California under date of April 15th, 1928;

990 That said Harry George Richard is the owner and holder of non-canceellable income policy numbered 4638108 issued by The Pacific Mutual Life Insurance Company of California under date of May 15th, 1923;

That said Wilmot P. Rogers is the owner and holder of non-cancellable income policy numbered 4666014 issued by The Pacific Mutual Life Insurance Company of California under date of March 10th, 1926;

991 That said John F. Hassler is the owner and holder of non-cancellable income policy numbered 4669018 issued by The Pacific Mutual Life Insurance Company of California under date of May 26th, 1926;

That said Verne Reynolds Pentecost is the owner and holder of the following non-cancellable income policies issued by The Pacific Mutual Life Insurance Company of California; to-wit;
992 numbers 4668070 and 4668071, which policies were issued under date of May 27th, 1926;

That said Donald Vincent Nicholson is the owner and holder of two (2) non-cancellable income policies issued by The Pacific Mutual Life Insurance Company of California in about the year 1923;

That said Horace Rowan Gaither is the owner and holder of non-cancellable income
993 policy numbered 4641112 issued by The Pacific Mutual Life Insurance Company of California under date of August 13th, 1923;

That said Hugh King McKevitt is the owner and holder of non-cancellable income policies, to-wit: numbers 4608452, 4621872, 4623029 and 4623192 issued by The Pacific Mutual Life Insurance Company of California under date of August 30th, 1921;

994 That all of the policies mentioned in this paragraph are in full force and effect.

2. That the plan and agreement of rehabilitation as proposed by the Insurance Commissioner of the State of California in the above entitled matter and the agreement made and executed by said Insurance Commissioner as provided for in said plan and agreement are unjust, unfair and discriminatory against the owners and holders
995 of non-cancellable disability income policies issued by The Pacific Mutual Life Insurance Company of California, including the intervenors mentioned in paragraph 1 hereof, and that said plan and agreement discriminate unfairly and unjustly in favor of all other types of policyholders of said The Pacific Mutual Life Insurance Company of California.

996 3. That said plan and agreement of rehabilitation and the said agreement made and executed by said Insurance Commissioner of the State of California as provided for in said plan and agreement are unjust, unfair and discriminatory in favor of the holders and owners of non-cancellable disability income policies of The Pacific Mutual Life Insurance Company of California who have filed or made claim under said policies prior to July 22nd, 1936, and that said plan and

997 agreement discriminate unfairly and unjustly against the holders of non-cancellable disability income policies of The Pacific Mutual Life Insurance Company of California who have not filed or made claim prior to July 22nd, 1936.

4. That due, proper and adequate notice as required by law was not given to the owners and holders of policies of The Pacific Mutual Life Insurance Company of California and to
998 all interested parties.

5. That said plan and agreement of rehabilitation and the agreement made and executed by said Insurance Commissioner as provided for in said plan and agreement are confiscatory.

6. That said plan and agreement of rehabilitation and the agreement made and executed by said Insurance Commissioner as provided for in
999 said plan and agreement are unfair, inequitable and against the best interests of all policyholders of The Pacific Mutual Life Insurance Company of California, and in particular said plan and agreement of rehabilitaion and said agreement so executed by said Insurance Commissioner of the State of California are unjust, inequitable, and against the best interests of the holders of non-cancellable disability income policies of The Pa-

1000 cific Mutual Life Insurance Company of California.

7. That said plan and agreement of rehabilitation and the said agreement made and executed by the Insurance Commissioner of the State of California discriminate unfairly and unjustly in favor of non-cancellable policyholders of certain premium classes as against non-cancellable policyholders of other premium classes in The
1001 Pacific Mutual Life Insurance Company of California.

8. That the percentage of the original monthly benefits assumed by Pacific Mutual Life Insurance Company, intervenor in the above entitled matters, in the different classes of non-cancellable policyholders is discriminatory and inequitable and without justification.

1002 9. That said plan and agreement of rehabilitation and the said agreement executed by the said Insurance Commissioner are unfair, unjust and inequitable in other and further particulars.

10. That the said Insurance Commissioner of the State of California and the above entitled court acted without jurisdiction or right in the purported sale of the assets of The Pacific

Mutual Life Insurance Company of California to the Pacific Mutual Life Insurance Company.

11. That due and proper notice was not given to all interested parties with reference to said purported sale.

12. That said purported sale was not made in accordance with law.

Wherefore, your said intervenors pray that said plan and agreement of rehabilitation and the said agreement executed by the Insurance Commissioner of the State of California as provided for in said plan and agreement of rehabilitation, be held and adjudicated to be unfair, inequitable and unjust; that the sale of said properties and assets of The Pacific Mutual Life Insurance Company of California to the Pacific Mutual Life Insurance be adjudicated void and of no effect, and for such other and further relief as may be meet and proper in the premises.

HUGH KING MCKEVITT,

Attorney for said Internevors, Charles Ross Cooper; Irving H. Granicher; Raymond Vincent Knowles; Harry George Richard; Wilmot P. Rogers; John F. Hassler; Verne Reynolds Pentecost; Donald Vincent Nicholson; Horace Rowan Gaither and Hugh King McKevitt.

Verified.

Endorsed: Filed Aug. 12, 1936, 9:46 a. m. L. E. Lampton, county clerk; by C. J. Bergquist, deputy.

1006 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent, Andrew J. Copp, Jr., intervener.

Complaint in Intervention.

Comes now Andrew J. Copp, Jr., and by leave
1007 of the court files this his complaint in intervention herein and for cause of action in intervention alleges:

I.

That heretofore, to-wit, on the 22nd day of July, 1936, an action entitled as above was commenced in the above entitled court by Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as petitioner, against The Pacific Mutual Life Insurance Company of Cali-
1008 fornia, a corporation, respondent, for an order appointing petitioner as a conservator of the defendant corporation, for an order to liquidate all of the assets and business of the Pacific Mutual Life Insurance Company of California, a corporation, respondent herein, and for an order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of The Pacific Mutual Life Insurance Company of California and for approval of amendment of rehabilitation, sale and

transfer of assets and reinsurance agreement; that said action has since that time been, and is now, pending herein; that the trial thereof has not been had.

II.

At all times in this complaint mentioned the respondent, The Pacific Mutual Life Insurance Company of California, a corporation, has been and now is a corporation duly organized and existing under and by virtue of the laws of the state of California and is, and at all of said times has been, engaged in the business of life and health and accident insurance in the state of California under a certificate of authority issued by the Insurance Commissioner of the State of California; that said respondent corporation at all said times has had and now has assets in the state of California and elsewhere and the office where the respondent corporation's business is and has been transacted during all of said times is in the state of California, county of Los Angeles.

III.

That on or about the 15th day of July, 1922, and for some time immediately prior thereto and for some time immediately subsequent thereto, Maude Ross Ferguson was the duly authorized agent of said respondent corporation, duly authorized by said respondent corporation to sell life, health and accident insurance of said respondent corporation and all of the acts, rep-

1012 resentations and conduct of said Maude Ross Ferguson as agent for and on behalf of said respondent corportion as hereinafter set forth were within the scope of said agency and were fully authorized by said respondent corporation and binding upon it.

IV.

On or about the said 15th day of July, 1922, the said respondent corporation, by and through its duly authorized agent, Maude Ross Ferguson, approached intervener and offered to sell to him and to cause to be issued by respondent corporation to him certain insurance protection referred to by said respondent corporation and said agent as a "pay five way policy," by the terms of which this intervener and the beneficiaries named by him in said policy would be protected and insured against loss in the event of death of the intervener, for loss of life, limbs, sight and time resulting from bodily injury sustained from accidental means and from loss of time from sickness; that said pay five way policy would be a twenty payment life containing the standard provisions found in policies of that kind, providing (a) for the payment of $10,000.00 to the beneficiary named therein in the event of the death of intervener; (b) for waiver of premiums and a monthly income of $100.00 upon receipt of proof of total and permanent disability occurring before the age of sixty years; (c) for payment of $10,000.00 in

one sum for accidental loss of life; (d) for payment of $200.00 per month for total disability accidentally caused; (e) for payment of $100.00 per month for partial disability accidentally caused; (f) for payment of $200.00 per month caused by sickness during the period of total disability; (g) for payment of $100.00 per month for temporary disability caused by sickness, liability under sub-paragraphs (d) and (f) limited to twelve months and liability under sub-paragraphs (e) and (g) limited to six months; (h) for payment of $300.00 per month against disability commencing while the policy would be in force and effect and resulting from bodily injury effected through accidental means and against disability commencing while said policy would be in force and resulting from sickness, such disability in both cases to be such as will result in a continuous, necessary and total loss from all business time; (i) for payment of sums less than $300.00 in the event of disability from either accidental cause or from sickness of a lesser degree than permanent total disability; the liability of the respondent corporation under sub-paragraphs (h) and (i) would be non-cancellable and would continue so long as the disability continued without power of the respondent corporation to cancel same or avoid its obligation in respect thereto.

1018

V.

That said respondent corporation, by and through said Maude Ross Ferguson, its duly authorized agent, represented and stated that the said insurance was a pay five way form of insurance which contained all of the features of protection and insurance above enumerated.

VI.

Intervener thereupon, on or about the 15th day of July, 1922, gave his consent to and accepted
1019 the said proposition of the respondent corporation, signed and executed his written application therefor on the form prepared by said Maude Ross Ferguson as agent of the respondent corporation, was physically examined by a physician employed for that purpose by said respondent corporation and in all other respects complied with the regulations and requirements of said respondent corporation in so far as they were disclosed to him at the time and in due
1020 course, shortly after or on or about the 15th day of July, 1922, said respondent corporation duly issued insurance substantially in accordance with the representation theretofore made by said respondent corporation by and through its duly authorized agent, Maude Ross Ferguson, as hereinabove set forth, and the insurance so issued was in compliance with intervener's application therefor and in conformity with the said respondent corporation's said offer but was set up in separate and several written contracts relating

however to the same matter between the same parties and made as parts of substantially one transaction and delivered to intervener together and at the same time and as part of the same transaction and intervener therefore alleges that the said several contracts comprising the insurance so sold and issued to him by said respondent corporation were and are to be taken together as but one entire and indivisible contract. One of said written contracts is numbered 464140 and is designated "Non-Participating, 20 Payment Life. Premiums Payable for 20 Years, or Until Prior Death. Permanent Total Disability Benefit. Form 5172. 1-21." Attached to this policy was an accident and sickness benefits policy providing benefits for loss of life, limbs, sight, time resulting from bodily injury sustained through accidental means and from loss of time from sickness. A copy of which is attached hereto, made part hereof and marked "Exhibit A." The other of said policies was numbered 4633015 and was designated "Non-cancellable Income Policy. Form A292. Renewable through age sixty. This policy provides indemnity for loss of time through accidental means, and for loss of time by sickness; to the extent herein provided." A copy of which policy is attached hereto, made a part hereof and marked "Exhibit B."

VII.

At the time this intervener consented to and accepted the said proposition and accepted the

1024 said policies of insurance and at all times thereafter he relied upon the promises and covenants of said respondent corporation to furnish him the protection and insurance therein provided for a continuous period so long as he should keep and maintain the said policies in full force, effect and virtue by paying the premiums thereon as therein specified and otherwise conforming to the conditions and covenants thereof on his part to be performed and at all said times intervener regarded the said insurance as a whole in 1025 what was commonly known and represented as a pay five way policy and relied upon each and every form and item of protection and insurance provided in said Exhibits A and B as a whole and as an indivisible entire contract and not otherwise and the principal consideration to him for accepting and consenting to said offer and accepting said insurance policies and paying the premiums thereof as hereinafter alleged was the entirety of said contract of insurance and 1026 the inclusion therein of all of the forms of protection therein provided and not otherwise and this intervener would not have accepted or consented to said offer or accepted said insurance or paid any of the premiums thereon if any portion of said protection insurance provided thereby had been omitted and particularly if he had known or suspected that the respondent corporation would cancel or endeavor to cancel the non-cancellable income policy No. 4633015, a

1027 copy of which is attached hereto and marked "Exhibit B", before the expiration thereof according to its own terms.

VIII.

On and after the 15th day of July, 1922, this intervener paid each and every installment of premium on all of said insurance and on each of said policies comprising the *the* same, strictly in accordance therewith and in that behalf has paid in the aggregate as premiums the sum of 1028 seven thousand three hundred sixty-two and 50/100 dollars ($7,362.50), no part of which sum has ever been repaid to intervener and said policies are, and each of them is, in full force, effect and virtue.

IX.

On the 26th day of July, 1936, a premium of $87.00 became due and payable from intervener to said respondent corporation pursuant to the provisions of said policy No. 4633015, a copy of 1029 which is attached to this complaint in intervention and marked "Exhbit B", and thereafter and on the 4th day of August, 1936, while said policy was in full force, effect and virtue, intervener tendered to said respondent corporation and to Pacific Mutual Life Insurance Company, a corporation, its purported successor-in-interest in respect to said insurance and to its and their duly authorized agent the amount of said premium, to-wit, the sum of $87.00 conditioned upon said premium being applied upon the said

1030 insurance of this intervener according to the terms and conditions thereof, which tender was then and there refused by said respondent corporation and said Pacific Mutual Life Insurance Company, a corporation, and by its and their duly authorized agent, with the explanation that said non-cancellable income policy No. 4633015 had been modified without previous notice to or consent of this intervener by a reduction of all benefits thereunder of sixty-five per cent thereof
1031 and the tender of $87.00 as premium on said policy would be accepted only and solely upon the condition that intervener would consent to said modification and sixty-five per cent reduction in benefits under said policy.

X.

Intervener alleges the fact to be that the said rejection of said tender and imposition of said arbitrary conditions and the attempted modification of said non-cancellable policy as above al-
1032 leged were, and each of them was, wrongful and without the consent of intervener and not binding upon him and intervener does hereby tender into court and continues his tender to respondent corporation or to its successor in interest as insurer under said several policies held by intervener, the said sum of $87.00 and alleges that he is ready, willing and able to pay the said sum upon said insurance according to the terms thereof.

1033 XI.

By the reorganization and rehabilitation plan and agreement of petitioner and respondent corporation herein, a copy of which plan is attached to the petition of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, herein for order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of the Pacific Mutual Life Insurance
1034 Company, and is made a part thereof and marked "Exhibit A", it is proposed that all of the properties and assets formerly owned by the respondent corporation, hereinafter referred to as the Old Company, and held by petitioner as liquidator of said Old Company, will be transferred and conveyed to the newly organized and incorporated company known as Pacific Mutual Life Insurance Company, hereinafter referred to as the New Company, with the exception of the stock
1035 of the New Company and certain claims reserved to the Commissioner as liquidator as more fully set forth in said plan and agreement and under said plan and agreement the policy holders of the Old Company will be given the following rights:

(a) All policyholders (other than holders of any form of noncancelable income policies hereinafter referred to as "non-can policies") will be entitled either (1) to accept the assumption

and reinsurance by the New Company of their existing policies or (2) to file a claim with the Commissioner as liquidator of the Old Company;

(b) The holders of non-can policies will be entitled either (1) to file a claim with the Commissioner as liquidator of the Old Company, or (2) to accept the assumption and reinsurance by the New Company of their existing policies on the reduced basis provided in the agreement hereinafter set forth.

The New Company will assume and agree to pay the following:

(a) All expenses of the administration of the Commissioner as conservator and liquidator of the Old Company, including such attorneys' fees as may be fixed by the Attorney General of the state of California and approved by the court in the conservation and liquidation proceeding;

(b) Unpaid taxes, wages, salaries and current operating bills of the Old Company;

(c) All claims filed with the Commissioner as liquidator of the Old Company and finally allowed by the Commissioner and/or by the court;

(d) All policy claims of whatever character (except claims on non-can policies), whether filed, or whether notice of which was filed, prior or subsequent to the order of liquidation; subject, however, to any and all defenses thereto

which would have been available to the Old Company;

(e) Only such claims on noncan policies, as were filed, or notice of which was filed with the Old Company prior to the order of liquidation; subject, however, to any and all defenses thereto which would have been available to the Old Company;

Provided, however, that the obligation of the New Company with respect to items (a), (b) and (c) shall be limited to the value of the properties and assets of the Old Company transferred to the New Company pursuant to the agreement hereinafter set forth less the reserves established by the New Company with respect to policies and policy claims of the Old Company assumed and/or reinsured by the New Company.

XII.

This intervener has been informed and believes and upon such information and belief alleges the fact to be that the new corporation was incorporated only and solely for the purpose of acquiring all of the assets and properties of said old corporation including its insurance business, life, health and accident, except the obligations of the Old Company under the so-called non-cancellable policies, so that there would be no interruption in the transaction of the business occurring at the time of such transfer and the new company was designed to be, and was in

1042 fact, but a continuation of the Old Company by merely a change of name and it is proposed that the New Company shall carry on the same business excepting in respect to the non-cancellable policies, and to the modified extent as in said plan and agreement specified, with the same officers and directors as of the Old Company, in the same location, with the same furniture, files and personnel, in the same manner and to the same extent and with like forms, the New Company assuming all of the debts and obligations
1043 of the Old Compapny saving and excepting only the obligations under the so-called non-cancellable policies. By such transfer and continuation of the business of the old corporation by the new corporation under the circumstances hereinabove alleged and as more fully explained in other pleadings on file herein, the identity of the old corporation is not destroyed nor are its legal obligations obliterated by the mere fact of reincorporation under the different name and a trans-
1044 fer of its assets from the old to the new corporation. And intervener further alleges the fact to be that the frankly disclosed and unconcealed purpose of such reincorporation and transfer of assets is to commit a fraud upon the holders of the non-cancellable policies in attempting to place beyond the reach of said non-cancellable policy holders the assets of said old corporation, and the principal and only purpose of such transfer of assets is to hinder, delay and defraud the owners and holders of said non-cancellable poli-

cies and in particular this intervener as the owner and holder of such a policy, numbered 4633015, a copy of which is attached hereto, made a part hereof and marked "Exhibit B", as creditors of said old corporation under said non-cancellable policies.

XIII.

If said rehabilitation and reorganization plan and agreement shall be carried into execution with the approval of the above entitled court and the same shall be binding upon this intervener, the legal effect will then be that the old corporation will have transferred to the new corporation all portions of the said insurance held by this intervener and hereinbefore described and contained in said Exhibits A and B attached hereto and made a part hereof, that are beneficial and profitable to said old and new corporations and said corporations will be relieved of the burdens and obligations of said insurance contracts with this intervener that are deemed to be unprofitable and onerous to said new and old corporations and this intervener, as the owner and holder of said policies, is entitled to rely upon them unimpaired and without loss of right to enforce the same against all of the assets and properties and resources of the old and new corporations.

XIV.

If said reorganization and rehabilitation plan and agreement is put into execution then this

1048 intervener, as the owner and holder of said non-cancellable policies will have no valid or enforceable agreement against the assets and properties of said old corporation and will have no valid or enforceable agreement thereunder against the new corporation or its newly acquired assets and will have no plain, speedy or adequate remedy at law.

XV.

If said reorganization and rehabilitation plan
1049 and agreement is put into execution the obligation of said insurance contracts will be impaired in violation of article I, section 10, clause 1 of the Constitution of the United States and in violation of the provisions of article I, section 16 of the Constitution of the state of California.

XVI.

If said rehabilitation and reorganization plan and agreement shall be carried into execution this intervener will be deprived of property with-
1050 out due process of law in violation of section I of the fourteenth amendment of the Constitution of the United States and in violation of the provisions of article I, Section 13 of the Constitution of the state of California.

Wherefore, this intervener prays for judgment:

1. That it be adjudged and decreed that said policies of insurance issued by said respondent corporation and held by this intervener are in

full force, effect and virtue and subsisting contracts of insurance according to their terms and binding upon and enforceable according to their terms both against the old and new corporations.

2. That it be adjudged and decreed that the new corporation has the same identity as the old corporation and has acquired the assets and properties of the old corporation subject to all of the obligations and liabilities of the old corporation particularly in respect to the non-cancellable policy held by this intervener, without impairment to the obligation of that contract in any respect.

3. That it be adjudged and decreed that that portion of the said reorganization and rehabilitation plan and agreement is a fraudulent conveyance and transfer and void as to this intervener as a creditor of said old corporation.

4. That the above entitled court revoke its order approving said rehabilitation and reorganization plan and agreement and the order approving the amendment thereto.

5. That said intervener herein have judgment against the petitioner and respondent corporation and Pacific Mutual Life Insurance Company, a corporation, intervener herein, for such other and further relief as may be deemed suitable in equity and for costs of suit.

ANDREW J. COPP, JR.,

Intervener, In Propria Personam.

1054 EXHIBIT "A"

Founded 1868

THE PACIFIC MUTUAL LIFE
INSURANCE COMPANY OF CALIFORNIA
(Capital fully paid $1,500,000.00)

Number 464140 Amount $10,000

In Consideration of the application for this Policy, a copy of which is attached hereto and made a part hereof, and of the payment in ad-
1055 vance of the Semi-annual premium of One Hundred Eighty and 50/100 Dollars, and the payment of a like premium on the Fifteenth day of April and October in each year during the continuance of this Policy until premiums shall have been paid for twenty entire years, or until the prior death of the Insured:

Promises to Pay, at the Home Office of the Company in the City of Los Angeles, on receipt at said Home Office of due proof of the death of
1056 Andrew James Copp, Jr., herein called the Insured, Ten Thousand Dollars less any indebtedness hereon to the Company and any unpaid portion of the premium for the then current policy year, to Cora Lord Copp, Wife of the Insured, or in the event that she shall die before the Insured, to Andrew James Copp, III, and Jane Pendexter Copp, Children of the Insured, equally or to the survivor, Beneficiary.

1057 Permanent Total Disability Benefit

Should the Insured, before attaining the age of sixty years and while this Policy is in full force and no premium thereon in default, become so disabled as to be totally and permanently unable to perform any work or engage in any occupation or profession for wages, compensation or profit, or suffer the irrevocable loss of the entire sight of both eyes, or the use of both hands or feet, or of one hand and one foot, the
1058 Company will waive the payment of future premiums, and pay the Insured One Hundred Dollars immediately on receipt of due proof of such disability or loss and a like sum on the first day of each month thereafter as long as the Insured shall live, and such waiver of premiums and payments to the Insured shall not affect any other benefits of values granted under the conditions of the Policy, provided, however, as follows:

1059 Should the Insured at any time thereafter, when required by the Company, (such requirement, however, not to be exacted more frequently than once a year,) be unable to furnish due proof of the continuance of his right to the foregoing benefits, the Company will discontinue the same and require the payment of any premiums which may thereafter become due under the conditions of the Policy, but no reimbursement shall be required for any premuims waived or monthly payments made.

1060 Should the Insured, in time of war, engage in any military or naval service, this Benefit shall thereby be made void.

Should the Insured, before attaining the age of sixty years, elect to have this Benefit cancelled, a reduction in the annual premium of twenty-five cents for each Ten Dollar unit of monthly payment hereunder will thereafter be made.

1061 The first year's insurance under this Policy is term insurance.

The contents of the succeeding pages of this Policy and the benefits, conditions and values set forth thereon are made a part hereof.

In Witness Whereof, The Pacific Mutual Life Insurance Company of California has, by its proper officers, signed this Contract, at the City
1062 of Los Angeles, as of the Fifteenth day of October, 1922.

J. E. MILLER
Assistant Secretary

GEORGE J. COCHRAN
President

Examined F. E.

Non-Participating, 20 Payment Life. Premiums Payable for 20 Years, or Until Prior Death. Permanent Total Disability Benefit. Form 5172. 1-21.

1063 Change of Beneficiary

The Insured, with the assent of the Assignee when there is an existing assignment, made as herein provided, other than an assignment to the Company as collateral security for a policy loan, may, while this Policy is in force, designate a new Beneficiary, reserving the right of revocation, by filing written notice thereof at the Home Office of the Company, accompanied by
1064 this Policy for endorsement. Such change shall take effect on the endorsement of the same on this Policy by the Company and not before. Should there by no Beneficiary living at the time this Policy becomes a claim by death, the proceeds hereof shall be paid to the Executors, Administrators or Assigns of the Insured.

Life Income Benefit at Age Sixty-five

On the anniversary date of this Policy nearest
1065 the sixty-fifth birthday of the Insured, if this Policy is then in full force and effect and free from indebtedness to the Company, the Insured may surrender this Policy for a fully paid contract providing for the payment to the Insured of a monthly income of $63.20.

The first monthly income payment shall be made on the anniversary date of this Policy nearest to the sixty-fifth birthday of the In-

1066 sured and subsequent payments shall be made on the first day of each month thereafter as long as the Insured shall live.

Cash Loan and Non-Forfeiture Benefits

Cash Loans

At any time after three full years' premiums have been paid, and while this Policy is in full force and effect, the Company will advance to the Insured, on the proper assignment of the Policy and on the sole security thereof, the whole or any part of 1067 the cash surrender value available at the end of the policy year in which application for the loan is made; provided that from such loan interest thereon to the end of the then current policy year, together with any indebtedness hereon to the Company and any unpaid portion of the premium for the current policy year, shall first be deducted.

Interest on the loan shall be at the rate of six per centum per annum, payable in advance 1068 on each anniversary date of the Policy. If interest is not paid when due, it shall be added to the principal and bear interest at the same rate. Failure to repay the loan or to pay interest thereon shall not avoid this Policy unless the total indebtedness hereon to the Company shall exceed the cash surrender value at the time of such failure, nor until thirty-one days after notice of such fact shall have been mailed by the Company to the last known address of the In-

1069 sured, and of the Assignee of record, if any, at the Home Office of the Company, The Company reserves the right to defer the granting of loans for a period not exceeding sixty days after application therefor is made, unless such loans are to be used to pay premiums on this Policy.

Non-Forfeiture

After this Policy shall have been in force three full years, the Insured
1070 may elect within three months after default in payment of premiums, but not later, any of the following options:

Option 1—Cash Surrender Value. Surrender this Policy to the Company at its Home Office for its cash value; or

Option 2—Paid-Up Life Insurance. Have this Policy endorsed by the Company for a reduced amount of paid-up life insurance, payable
1071 at the same time and on the same conditions as this Policy; or

Option 3—Paid-Up Term Insurance. Have the insurance for the face amount of this Policy less any indebtedness hereon to the Company, continued in force from date of default for such term as is hereinafter provided, but without the right to loans.

End of Year	Cash Loan Value or Cash Surrender Value	Paid-Up Life Insurance	Paid-Up Term Insurance Years	Paid-Up Term Insurance Days
3	$ 510	$1120	4	295
4	780	1670	7	11
5	1060	2220	9	5
6	1340	2760	10	273
7	1640	3290	12	90
8	1950	3830	13	195
9	2260	4350	14	237
10	2590	4870	15	225
11	2920	5380	16	173
12	3270	5890	17	90
13	3620	6400	17	354
14	3990	6900	18	251
15	4370	7410	19	158
16	4770	7920	20	95
17	5180	8420	21	86
18	5610	8940	22	179
19	6050	9460	24	150
20	6520	Fully Paid		E

The cash surrender value shall be equal to the entire reserve on the face amount of this Policy, computed according to the American Experience Mortality Table and interest at the rate of three and one-half per centum per annum. Any indebtedness hereon to the Company shall be deducted from the cash surrender value.

1075 The amount of the paid-up life insurance or the term of the paid-up term insurance shall be such as the amount of the cash surrender value, reduced by the amount of any indebtedness hereon to the Company, will purchase, applied as the net single premium at the attained age of the Insured based on the American Experience Mortality Table and interest at the rate of three and one-half per centum per annum.

The Company reserves the right to defer the
1076 granting of a cash surrender value for a period not exceeding sixty days after application therefor is made. If the Insured shall not, within
Automatic Non-Forfeiture three months from default, surrender this Policy to the Company at the Home Office for its cash surrender value, as provided in Option 1, or for endorsement as paid-up life insurance as provided in Option 2, the insurance will be automatically continued as provided in Option 3.

1077 Table of Values The values in the table, computed as hereinbefore provided, are guaranteed on the conditions that the Policy shall have been in force and the premiums paid in full to the end of the year stated, and that there shall be no indebtedness hereon to the Company. Due allowance will be made in computing values for any quarter-annual or semi-annual premium payments which may have been made in addition to the premiums for the full number of years indicated.

1078 The cash loan values provided for in the table for the end of policy years can be obtained during such policy years, as set forth in the paragraph marginally headed "Cash Loans."

Values for later years shall be computed as provided in the paragraph marginally headed "Non-Forfeiture." Such values will be furnished on request.

General Conditions.

1079 Incontestability. This policy and the application herefor constitute the entire contract between the parties hereto and shall be incontestable after one year, except for non-payment of premium or for violation of the conditions of the Policy relating to military or naval service in time of war.

Statements. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this Policy, unless it is contained in the written application herefor, a copy of which is attached hereto and made a part hereof.

1080

Age. If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Payment of Premiums. All premiums on this Policy are due and payable in advance at the Home Office of the Company, but

1081 may be paid to the agents of the Company producing receipts signed by the President, a Vice-President, the Secretary or an Assistant Secretary, and countersigned by such agents. The mode of premium payment will be changed by the Company, upon request from annual to semi-annual or quarter-annual or vice versa at the premium rates in use by the Company at the date hereof, but a semi-annual or quarter-annual payment shall not have the effect to continue
1082 this Policy in force longer than for the six months or three months covered by such payment, subject to the provisions herein relating to grace. If this Policy become a claim by death, the Company shall have the right to deduct any part or parts of the policy year's premium unpaid. If any premium be not paid when due, or within the grace of thirty-one days, the only liability of the Company under this Policy, if any, shall be such as set forth in the paragraphs
1083 marginally headed "Non-Forfeiture" and "Automatic Non-Forfeiture."

5172. 1-21. P. 2.

Grace — A grace of thirty-one days shall be granted for the payment of every premium after the first, during which time the insurance hereunder shall continue in force. If death occur within said grace period, the unpaid premium or portion thereof for the then current policy year shall be deducted from the amount payable hereunder.

1084 General Conditions—Continued

Non-Participation Restoration

This Policy, including all the benefits and values obtaining hereunder, shall not participate in the surplus earnings of the Company.

After any default in payment of premium this Policy, if not surrendered to the Company, may be restored to full force and effect at any time within five years from the date of such default on written application by the Insured to the
1085 Home Office of the Company and the payment of premiums to date of restoration with interest thereon at the rate of six per centum per annum, provided the Insured shall with such application submit evidence of insurability satisfactory to the Company.

Agents Indebtedness

Agents are not authorized to make, alter or discharge contracts.

In making any payment or settlement under this Policy, except under the Permanent Total Disability Benefit,
1086 any indebtedness to the Company hereon shall first be deducted.

Assignment

Any assignment of this Policy must be made in writing. The Company shall not be deemed to have knowledge of any assignment unless the original or a duplicate thereof is filed at the Home Office of the Company and its receipt duly acknowledged. The Company will not assume responsibility for the validity of any assignment.

1087 **Military or Naval Service** If within five years from the date of this Policy the Insured shall engage in any military or naval service in time of war, the liability of the Company in event of the death of the Insured while so engaged, or as a result thereof within six months thereafter but within the period of the war, will be limited to the return of the premiums paid hereon, exclusive of any extra premium paid for military or naval service, less any
1088 indebtedness to the Company hereon; unless before engaging in such service or within thirty-one days thereafter, or at the time of paying the first premium due hereon, if the Insured shall be then so engaged, the Insured shall pay to the Company at its Home Office in the City of Los Angeles such extra premium as may be required by the Company, and in like manner shall pay annually thereafter on each anniversary of this Policy or within thirty-one days, while the In-
1089 sured shall continue to be so engaged, such extra premium as may be required by the Company. The foregoing requirements shall not be construed as inoperative should the Policy be in force under an automatic or other non-forfeiture provision.

Within one year after the termination of the war the Company will return such portion of the extra premiums as in its judgment will not be required to cover the extra hazard.

1090 If at any time after the date of this Policy the Insured shall engage in any military or naval service in time of war, the Permanent Total Disability Benefit of this Policy shall thereby be made void, regardless of the payment of extra premiums to the Company, as hereinbefore provided. In the event of such voidance, on written request any unearned permanent total disability premium will be refunded to the Insured and a reduction in the annual premium of twenty-five
1091 cents for each Ten Dollar unit of Permanent Total Disability Benefit will thereafter be made.

Suicide Should the Insured within one year from the date of this Policy commit suicide, sane or insane, the only liability under this Policy shall be for an amount equal to the premiums paid hereon.

Settlement Options.

The insured may elect to have the death bene-
1092 fit under this Policy, or any portion thereof, paid in accordance with the following settlement options, and may subsequently change or revoke such election;

Option 1. Retained by the Company, improved with compound interest at the rate of three and one-half per centum per annum and, together with the accrued interest thereon, paid at such time as agreed on with the Company in the election of this option;

1093 Option 2. Retained by the Company, interest at the rate of three and one-half per centum per annum to be paid thereon monthly, quarter-annually, semi-annually or annually, and the amount so retained, with any unpaid accrued interest thereon, to be paid at such time as agreed on with the Company in the election of this option;

Option 3. Retained by the Company and instalments of an amount designated by the In-
1094 sured to be paid monthly, quarter-annually, semi-annually or annually, until the amount retained shall be exhausted, the unpaid portion of the death benefit, while so retained, to be improved with interest at the rate of three and one-half per centum per annum;

Option 4. Paid in monthly instalments certain, in accordance with Table A;

Option 5. Paid in continuous monthly instalments (120 or 240 instalments certain and for
1095 life of the Beneficiary thereafter), in accordance with Table B. The amount of each instalment shall be determined by the age at last birthday of the Beneficiary, such age to be computed as of the date when the first instalment shall become payable, the Beneficiary to then submit evidence of age satisfactory to the Company.

Should more than one Beneficiary be entitled to payment under this option when the first instalment becomes due, the portion of the death

1096 benefit then accruing to each of such Beneficiaries shall be applied separately to the purchase of the instalments, the amount thereof to be determined in the manner set forth in the paragraph immediately preceding.

This option shall not be available if the Beneficiary shall be a partnership, a company or a corporation.

Ech election, change or revocation of an elec-
1097 tion shall be made by the Insured in writing and shall take effect on the endorsement thereof on this Policy by the Company.

These settlement options shall be *avilable* to the Beneficiary at the time this Policy becomes a claim by death, if no election, made by the Insured, shall be then operative.

Unless the Insured shall assent thereto, by filing written notice thereof at the Home office
1098 of the Company, accompanied by this Policy for endorsement thereon, the Beneficiary shall not have the right to modify or change an election made by the Insured, nor to assign any payments to be made to the Beneficiary thereunder.

Under any election hereunder, the Policy shall be surrendered to the Company when the death benefit becomes payable and a contract issued providing for payment in accordance with such election.

1099 In lieu of the payment of monthly instalments, in accordance with Options 4 or 5, an election for the equivalent thereof in quarter-annual, semi-annual or annual payments may be made. To Obtain the amount of each of such payments, multiply the amount of the monthly instalment shown in Table A or B by 2.991 for quarter-annual, 5.957 for semi-annual or 11.812 for annual payments.

1100 The payment of the first instalment under Option 3, 4, or 5 shall be made immediately on receipt of due proof of the death of the Insured, and of subsequent instalments on the first day of each month, quarter-annually, semi-annually or annually thereafter, in accordance with the election made.

An election under Option 2, 3, 4 or 5 shall be inoperative should the amount of the death bene-
1101 fit otherwise available, be not sufficient for the payment of interest or instalments of at least $5.00 monthly, $15.00 quarter-annually, $25.00 semi-annually or $40.00 annually.

Should the death benefit become payable, in accordance with an election hereunder, to a single Beneficiary, but such Beneficiary die before the completion of all payments due, the total amount then retained by the Company, under Option 1,

1102 2 or 3, or the value of the then unpaid instalments certain under Option 4 or 5, commuted at the rate of three and one-half per centum per annum, shall be paid in one sum to the Executors, Administrators or Assigns of such Beneficiary.

Should the death benefit become payable, in accordance with an election hereunder, to more than one Beneficiary, whether such Beneficiaries are to participate equally, unequally or successively, the conditions of the beneficiary designa-
1103 tion in the Policy relating to apportionment, survivorship and order of succession shall continue in full force after the death of the Insured until the payment of the death benefit shall have been completed; except that, should a Beneficiary become entitled to benefits under Option 5, only the balance, if any, of the instalments certain shall be paid to any surviving Beneficiary entitled to receive any balance due; and except further, that upon the death of a last surviving Beneficiary,
1104 the total amount then retained by the Company under Option 1, 2 or 3, or the value of the then unpaid instalments certain, if any, under Option 4 or 5, commuted at the rate hereinbefore provided, shall be paid in one sum to the Executors, Administrators or Assigns of such Beneficiary.

Should there be no Beneficiary living when this Policy becomes a claim by death, any election made by the Insured shall be inoperative.

1105 Settlement Options

The tables below are based on a Policy the proceeds of which are one thousand dollars, and will apply pro rata to this Policy.

TABLE A

Monthly Instalments Certain

Number of Instalments	Amount of Each Instalment
60	$18.12
1106 120	9.84
180	7.11
240	5.76

TABLE B

Continuous Monthly Instalments (120 or 240 instalments certain and for life thereafter)

Age of Beneficiary at Date of Payment	Amount of Each Instalment (120 certain)	Amount of *East* Instalment (240 certain)
1107 10 & Under	$3.76	$3.66
11	3.78	3.68
12	3.79	3.69
13	3.81	3.71
14	3.83	3.72
15	3.84	3.74
16	3.86	3.76
17	3.88	3.77
18	3.90	3.79

1108	19	3.92	3.81
	20	3.95	3.83
	21	3.97	3.85
	22	3.99	3.88
	23	4.02	3.90
	24	4.05	3.92
	25	4.08	3.95
	26	4.11	3.98
	27	4.14	4.00
	28	4.17	4.03
1109	29	4.21	4.06
	30	4.25	4.10
	31	4.29	4.13
	32	4.33	4.16
	33	4.37	4.20
	34	4.42	4.24
	35	4.47	4.28
	36	4.52	4.32
	37	4.57	4.36
	38	4.63	4.41
1110	39	4.69	4.45
	40	4.75	4.50
	41	4.82	4.55
	42	4.89	4.60
	43	4.96	4.65
	44	5.04	4.71
	45	5.12	4.76
	46	5.21	4.82
	47	5.30	4.87
	48	5.40	4.93

1111	49	5.50	4.99
	50	5.61	5.05
	51	5.72	5.10
	52	5.84	5.16
	53	5.96	5.22
	54	6.09	5.27
	55	6.22	5.32
	56	6.36	5.37
	57	6.51	5.42
	58	6.66	5.47
1112	59	6.82	5.51
	60	6.97	5.55
	61	7.14	5.58
	62	7.30	5.62
	63	7.47	5.65
	64	7.64	5.67
	65	7.82	5.69
	66	7.99	5.71
	67	8.16	5.72
	68	8.32	5.74
1113	69	8.49	5.74
	70	8.65	5.75
	and over		

Attached thereto:

The Pacific Mutual Life Insurance Company of California

In consideration of the payment of an initial term premium of Forty and 50/100 Dollars, it is

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understood and agreed that Policy No. 464140 dated Oct. 15, 1922 issued on the life of Andrew James Copp, Jr. (referred to in the Policy as the "Insured") shall be considered as in full force and effect from the date of this agreement until the date of the Policy, provided, however, that there shall be no liability under this agreement until the Policy shall be manually delivered to the Applicant and the entire amount of the initial term premium actually paid during said Applicant's lifetime and good health.

It is further agreed that the Company shall have the right to deduct from any amount which may become payable the unpaid balance of one full year's premium from the date of this agreement, based on the annual premium required to be paid under the conditions of the Policy.

Attached to and made a part of Policy No. 464140

Dated this Fifteenth day of July, 1922.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

George J. Cochran

President

J. E. Miller

Assistant Secretary

Initial Term Life—Form 839-C

1117 APPLICATION FOR LIFE INSURANCE

The Pacific Mutual Life Insurance Company
of California

1. Full Name (Please print) Andrew James Copp, Jr.

2. Residence (Town Los Angeles (No. 314 S. Union Ave. Street
(County Los Angeles State Calif.
Business (Town Los Angeles (No. 412 Copp Building Street
State Calif.

1118 (Name of Firm or Employer Self

3. Place of Birth Town or County Millerton State N. Y. Date of Birth Day 15 Month Oct. Year 1880 Age at nearest birthday 42

4. A. Occupation Lawyer How long so engaged? 18 years

It is not sufficient to state (for example) "Merchant," "Mechanic", "Salesman," or "Clerk"; the particular branch of business or trade must be specified and exact duties given.

1119

B. Any other occupations. State duties in full. None

C. Former occupations. State duties in full. Teacher

D. Temporary or permanent changes in occupation contemplated. None

E. No special journey, or travel outside of the mainland of the United States, is contemplated, except No exceptions

1120 5. Amount of Insurance If Income Insurance, state amount of monthly payment. $10,000

6. Plan of Policy (A. Insert Ordinary Life, — Payment Life, — Year Endowment, or other plan desired. 20 Payment Life
(B. Insert Annual Dividend or Non-Participating. Non-participating

7. A. Premiums to be paid Insert Annually, 1121 Semi-Annually, or Quarter-Annually Semi-Annually

B. Notices to be sent to State whether Residence or Business Address. Business

8. A. Pay Death Benefit to Cora Lord Copp, my wife or in case of her pr or decease

Print name of Beneficiary in full and state relationship to Applicant

to (Andrew James Copp III, son)
(Jane Pendexter Copp, daughter)

1122 Equally or survivor, Beneficiary, or should there be no Beneficiary living at time policy becomes a claim by death, then to the Executors, Administrators or Assigns of the Insured.

B. If Continuous Monthly Income Policy is applied for, give Date of Birth of Beneficiary: Day Month Year

9. Other Life Insurance Company or Fraternal Order Travelers Amount Plan of Policy $5000 20 Payment Life 10,000 Term

1123 Year taken 1917 1918 Now in force U. S. Government

10. I agree that my acceptance of any policy issued on this application shall consittute a ratification by me of any correction or addition made by the Company hereto in the space provided "For Home Office Endorsements Only."

For Home Office Endorsements Only

11. I hereby declare that all the foregoing state-
1124 ments, and the answers to the Company's Medical Examiner in continuation of and forming a part of this application, are made by me to obtain the insurance hereby applied for and are complete, true and correct, and I understand that the Company, believing them to be such, will rely and act on them.

It is understood and agreed (1) that if the entire amount of the first annual, semi-
1125 annual or quarter-annual premium, as selected by me under the statement numbered "7-A" on the insurance herein applied for, is not paid at the time of making this application, there shall be no liability on the part of the said Company under this application unless nor until a policy shall be issued and manually delivered by me and the entire amount of such first premium thereon actually paid during my lifetime and while I am in good health; and (2) that if the entire

1126 amount of such first premium is paid to the said Company's Agent at the time of making this application, the insurance (subject to the provisions of the said Company's policy applied for) shall be effective from the date of my medical examination therefor and such a policy shall be issued and delivered to me or to my legal representative, provided the said Company in its judgment shall be satisfied as to my insurability on the
1127 date of such medical examination, for the amount and on the plan and form applied for; and (3) that if the said Company shall not be so satisfied, the entire amount of the premium paid, without interest, shall be returned.

Dated at Los Angeles this 15 day of July 1922.

ANDREW JAMES COPP, JR.
Applicant's own signature in ink.

1128 Signed in the)
Presence of)
Maude Ross Ferguson
Soliciting Agent

131312 G Note: In the Interest of the Applicant a settlement should be made at the time of signing this application

Statement to be signed by applicant for settlement with agent:

I hereby declare that I have paid to Maude Ross Ferguson, Agent of The Pacific Mu-

1129 tual Life Insurance Company of California, $59.25 By check and $218 By note Dollars, and hold a receipt for the same on form detached from and corresponding in date and number with this application.

Date July 15, 1922.

ANDREW JAMES COPP, JR.

Applicant's own signature in ink.

Form 4324

1130 Questions to Be Asked by the Medical Examiner

(This examination must be made in private by a regularly appointed Medical Examiner, no Agent or other third person being present)

In continuation of and forming a part of my Application for Insurance to The Pacific Mutual Life Insurance Company of California.

1. A. Where have you resided during summer and winter of last ten years? A Calif.

1131 B. Have you ever changed or been advised to change your occupation or residence to benefit your health? B No

2. A. How much of each of the following alcoholic beverages do you use daily? A. Spirituous none Beer None Wine none

B. Have you ever used them to excess? (Give particulars.) B. No

C. Have you ever used opium, cocaine or any other drug? C. No

1132 D. Have you ever taken treatment for liquor or drug habit? If so, when and where? D. No

E. If a total abstainer, how long so? E. Always

F. Have you ever engaged in the manufacture or sale of wines, spirits or malt liquors? When and how long? F. No

3. A. Has any one in your family committed suicide or suffered from Cancer, Epilepsy or Insanity? (Details each such case.) A. Brother ded'd Traumatic Insanity Worcester State Institution Mass.

1133

B. Has any one in your family or in your immediate household ever suffered or died of Consumption or any other contagious disease? (Details each such case.) B. No.

4. A. Has any Insurance or Assessment Company or Fraternal Society ever refused you Insurance, or limited or postponed your Application? (Details each such case.) A. No

1134

B. Have you ever applied for Insurance without getting the Policy, or have you any other Application now pending? B. No

C. Have you ever applied for a pension or Government Compensation? If so, give the cause for each such claim. C. No

Give name, history date and duration of each disease or symptom

1135 5. Have you ever had or been treated for: Yes or No

A. Apoplexy, Paralysis, Epilepsy, Dizziness, Mental Derangement? No

B. Asthma, Shortness of Breath, Chronic Cough, Spiting of Blood? No

C. Influenza, Pneumonia, Pleurisy, Bronchitis, Tuberculosis? No

D. Disease of Heart or Blood Vessels, Sunstroke, Nervous Prostration? No

1136 E. Gastric or Duodenal Ulcer, Indigestion, Appendicitis, Piles, Fistula? No

F. Liver, Kidney or Bladder Disease, Sugar or Albumin in Urine? No

G. Colic, Gravel, Gall Stones, Jaundice, Malarial or other Fevers? No

H. Cancer, Tumor, Open Sores, Goitre, Enlarged Glands, Skin Disease? No

I. Locomotor Ataxia, Lumbago, Gout, Rheumatism, Syphilis? No

1137 J. Difficulty with Sight or Hearing, Discharge from the Ear? No

K. Have you ever had a surgical operation? No

L. Have you given full information about each disease or symptom mentioned above which you have ever had or been treated for? Yes

6. Have you had any injuries or illnesses or consulted or been treated

1138 by any physician or practitioner during last seven years? No
Give particulars each illness, Injury, Consulation and Treatment
Date Duration Result
Physician's Name and Address

7. Has your weight in the past year (Increased? no How much? None lbs.
(Diminished? No

8. Are you now in good health? Yes

1139 9. Family Record?

		State of health; if not good,		Cause of Death:
	Age if living	give full details	Age at Death	give full details
Father	76	good		
Mother	68	good		
B Number				
re Living(2)				
1140	36			
or	40	good		
ts Number				
h dead(1)			27est	Pneumonia
St Number				
ie Living(0)				
sr Number				
s Dead(1)			10	Diphtheria
Date of Death			How long sick	
1906			a few days	
1896			4 days	

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Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON AND ALFRED F. MACDONALD, PETITIONERS,

vs.

SAMUEL L. CARPENTER, JR., INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED APRIL 2, 1938.

CERTIORARI GRANTED MAY 16, 1938.

BETTIN, PAINTER & WAIT,
Rives-Strong Bldg., Los Angeles, Cal.,
Attorneys for Appellants and Respondents Vernon Bettin and William George Dickinson.

U. S. WEBB, *Attorney General,*
State Bldg., Los Angeles, Cal.;

SHEPARD MITCHELL,
Roosevelt Bldg., Los Angeles, Cal.,
Attorneys for Respondent Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

O'MELVENY, TULLER & MYERS,
Title Insurance Bldg., Los Angeles, Cal.;

OVERTON, LYMAN & PLUMB,
Roosevelt Bldg., Los Angeles, Cal.,
Attorneys for Respondent Pacific Mutual Life Insurance Company of California, a Corporation.

HUGH K. MCKEBITT,
Russ Bldg., San Francisco, Cal.,
Attorney for Respondent Charles Ross Cooper et al.

RUPERT B. TURNBULL,
Title Insurance Bldg., Los Angeles, Cal.,
Attorney for Respondents Rupert B. Turnbull et al., for Themselves and for Other Non-Cancellable Policyholders Similarly Situated and for Francis Adams for Himself and for Other Non-Cancellable Policyholders Similarly Situated.

MANIERRE & CUTHBERTSON,
Garfield Bldg., Los Angeles, Cal.,
Attorneys for Respondents George W. Manierre and B. Robert Getts on Their Own Behalf and on Behalf of All Similarly Situated Policyholders.

KENYON F. LEE,
H. W. Hellman Bldg., Los Angeles, Cal.,
Attorney for Respondents E. B. Tilton et al.

H. S. DOTTENHEIM,
Board of Trade Bldg., Los Angeles, Cal.,
Attorney for Respondents Marshall D. Hall and Joseph C. McManus on Behalf of Themselves and Other Holders of Non-Cancellable Income Policies.

NEIL S. MCCARTHY,
Associated Realty Bldg., Los Angeles, Cal.,
Attorney for Respondents Neil S. McCarthy on His Own Behalf, Ralph R. Huesman and Broadtown Investment Company, a Corporation.

W. B. ETHERIDGE,
First Trust Bldg., Pasadena, Cal.,
Attorney for Respondents Dr. Arthur B. Allen et al.

DELVY T. WALTON,
Rowan Bldg., Los Angeles, Cal.,
Attorney for Respondents David Lynn Openshaw et al.

ALBERT E. COGER,
H. W. Hellman Bldg., Los Angeles, Cal.,
Attorney for Respondent Henry B. Senn.

HERBERT E. FRESTON,
Bank of America Bldg., Los Angeles, Cal.,
Respondent in Pro. Per.

JACOB J. LIEBERMAN,
AARON B. ROSENTHAL,
Garfield Bldg., Los Angeles, Cal.,
Attorneys for Respondents Robert J. Webb and Philip M. Klutznick for Themselves and All Other Persons Similarly Situated.

LAWLER & FELIX,
Standard Oil Bldg., Los Angeles, Cal.,
Attorneys for Respondent R. Rabinowitz.

ROSCOE R. HESS,
Rives-Strong Bldg., Los Angeles, Cal.;
DAVID R. RUBIN,
Financial Center Bldg., Los Angeles, Cal.,
Attorneys for Respondent Roscoe R. Hess.

CHAPMAN, SNIDER, DUKE & LANDIS,
HIRAM W. JOHNSON, JR.,
FRANK P. DOHERTY,
Title Insurance Bldg., Los Angeles, Cal.,
Attorneys for Respondents G. C. Parsons, J. A. Marvin and G. R. Snider et al., on Behalf of Themselves and All Other Holders of Non-Cancellable Policies, and as Members of a Protective Committee for Holders of Non-Cancellable Income Policies.

REX HARDY,
Van Nuys Bldg., Los Angeles, Cal.,
Attorney for Respondents Austin O. Martin and Rex Hardy.

IVAN MERRICK,
State Bldg., Olympia, Wash.,
Attorney for Respondent William A. Sullivan, Insurance Commissioner of the State of Washington.

ARTHUR E. WHITE,
Roosevelt Bldg., Los Angeles, Cal.,
Respondent in Pro. Per.

OSCAR LAWLER,
Standard Oil Bldg., Los Angeles, Cal.;
HAROLD JUDSON,
Pacific Mutual Bldg., Los Angeles, Cal.,
Attorneys for Respondents George I. Cochran et al.

SHATTUCK, DAVIS & STORY,
Story Bldg., Los Angeles, Cal.,
Attorneys for Respondents William A. Beckett et al.

PAUL OVERTON,
James Oviatt Bldg., Los Angeles, Cal.,
Attorney for Respondent Arthur D. Wunner.

LATHAM, WATKINS & BOUCHARD,
Title Guarantee Bldg., Los Angeles, Cal.,
Attorneys for Respondents C. N. Wesley et al.

v.

BELL, BOYD & MARSHALL,
NEWLIN & ASHBURN,
Edison Bldg., Los Angeles, Cal.,
Attorneys for Respondents Wilbur G. Katz et al.

CARL C. KATLEMAN,
Garfield Bldg., Los Angeles, Cal.,
Attorney for Respondents Carl C. Katleman et al., for Himself and All Others Similarly Situated.

ANDREW J. COPP, JR.,
Pacific Commerce Bldg., Los Angeles, Cal.,
Respondent In Pro. Per.

GARNET C. RAINEY,
Quinby Bldg., Los Angeles, Cal.,
Attorney for Respondent Ralph C. Hamlin.

CHAPMAN & CHAPMAN,
Security Title Ins. Bldg., Los Angeles, Cal.,
Attorneys for Respondents Rowe Sanderson et. al.

HAHN & HAHN,
Pacific Southwest Bldg., Pasadena, Cal.,
Attorneys for Respondents Robert Casamajor et al.

BEN S. HUNTER,
Rowan Bldg., Los Angeles, Cal.,
Respondent In Pro. Per.

M. W. PURCELL,
Black Bldg., Los Angeles, Cal.,
Attorney for Respondents Clara M. Garunan et al.

JOHN P. OLIVER,
Pacific Commerce Bldg., Los Angeles, Cal.,
Respondent In Pro. Per.

LOEB, WALKER & LOEB,
Pacific Mutual Bldg., Los Angeles, Cal.,
Attorneys for Respondents Harold S. Cook et al.

WILLIAM M. RAINS,
Citizens National Bank Bldg., Los Angeles, Cal.,
Attorney for Respondents Edwin Janss et al.

D. M. ELLISON,
Baton Rouge, Louisiana,
Attorney for Respondent E. A. Conway, Secretary of State of Louisiana.

COSGROVE & O'NEIL,
Rowan Bldg., Los Angeles, Cal.,
Attorneys for Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

A. A. CARMICHAEL,
Montgomery, Alabama,
Attorney for Respondents J. Parker Evans, on Behalf of Himself and All Other Holders of Active Life Non-Cancellable Income Policies Issued in the State of Alabama Who May Wish to Join With Him in the Proceeding.

1141 10. A. Ages attained by Grandparents?
Father's Father 45est
Father's Mother 89
Mother's Father 50 est
Mother's Mother 76 est

B. Have any of your grandparents suffered or died of Consumption or Apoplexy? (Details) No.

Dated at Los Angeles Calif. this 15 day of July 1922

1142 ANDREW JAMES COPP, JR.
Applicant's own signature in full

Witness Allen L. Winter M. D.
Medical Examiner

Form 4325B

Kindly use Black ink as this blank is to be photographed.

Answers must be explicit and in the handwriting of the Examiner. Check marks or dashes do not constitute an answer.

1143 Endorsed on back:

No. 464140

The Pacific Mutual Life Insurance Company of California

Insured Andrew James Copp, Jr. Age 42

Amount $10,000

Annual Premium	$347.50
Semi-Annual	$180.50
Quarter-Annual	$ 92.00

Date October 15, 1922.

1144 Notice: It is unnecessary for the Insured or the Beneficiary to employ the services of any person, firm or corporation, in collecting the insurance under this Policy, or in receiving any of its benefits, Time and expense will be saved by writing direct to the Home Office or to the General Agency where premium payments have been made.

Non-Participating, 20 Payment Life. Premiums Payable for 20 years, or Until Prior Death.
1145 Permanent Total Disability Benefit.
Form 5172. 1-21.

"Accident and Sickness Benefits" Policy

This policy provides benefits for loss of life, limbs, sight and time resulting from bodily injury sustained through accidental means; and from loss of time from sickness; to the extent herein provided.

The Pacific Mutual Life Insurance
146 Company of California (herein called Company)

in consideration of the payment of Eighteen and 76/100 Dollars premium, (the premium for a term of twelve months being $75.00) HEREBY INSURES Andrew James Copp, Jr. (herein called Insured), a resident of Place Los Angeles County Los Angeles State California for the term of three months commencing at 12 o'clock noon, Standard time at the place where this policy is countersigned, on the 15th day of July 1922,

1147 by occupation a Attorney-at-Law classified A by the Company, AGAINST

(1) Loss of life, limbs or sight, as hereinafter set forth, resulting directly and independently of all other causes, from bodily injuries effected through external, violent and accidental means;

(2) Disability as hereinafter set forth, resulting directly and independently of all other causes, from bodily injuries effected through external, violent and accidental means;

1148 (3) Disability as hereinafter set forth, resulting directly and independently from all other causes, from sickness, which sickness is contracted and begins after the date hereof;

Subject to all provisions and limitations herein contained, as follows:

Accident Benefits

Accidental Loss of Life, Limbs and Sight

1149 (a) Ten Thousand Dollars will be paid in one sum should loss of life, loss of both hands, loss of both feet, loss of one hand and one foot, or loss of the sight of both eyes, so accidentally caused, result within ninety days from date of the accident. Loss shall mean with regard to hands and feet, amputation of both entire hands at or above the wrist, amputation of both entire feet at or above the ankle, or amputation of one entire hand at or above the wrist and one entire foot at or above the ankle; with regard to eyes, irrecoverable loss of entire sight of both eyes.

Total Disability

(b) Two Hundred Dollars per month will be paid while disability so accidentally caused, consists of continuous total loss of business time and such disability immediately follows the accident, herein called total disability.

Partial Disability

(c) One Hundred Dollars per month will be paid while disability so accidentally caused, is not total but consists of continuous inability to prosecute important daily business duties, from either the time of accident or the termination of such total disability.

Liability under clause "c" is limited to six months, and under clause "b" and "c" together, to twelve months.

Sickness Benefits

House Confinement

(d) Two Hundred Dollars per month will be paid while disability so caused by sickness, consists of continuous confinement inside the house accompanied by regular visits by a legally qualified physician.

Convalescence

(e) One Hundred Dollars per month will be paid in case of valid claim under clause "D", while disability so caused by sickness continues after termination of such confinement and consists of inability to transact any and every kind of busi-

ness, and requires the Insured to be under the care of a legally qualified physician.

Liability under clause "e" is limited to six months, and under clauses "d" and "e" together, to twelve months.

Standard Provisions

Change of Occupation

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured or contracts sickness after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate within the limits so fixed by the Company for such more hazardous occupation.

If the law of the state in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the pre-

1156 mium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Company is liable.

1157

Changes in Policy

2. No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

1158

Reinstatement of Policy

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

1159 Time Notice of Claim

4. Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencment of disability from such sickness. In event of accidental death immediate notice thereof must be given to the Company.

1160 Sufficiency of Notice

5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at its Home Office, 501 West Sixth Street, in the city of Los Angeles, California or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to 1161 give such notice and that notice was given as soon as was reasonably possible.

Form A 194-U

Forms for Proof of Loss

6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with

1162 the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

Proof of Loss

7. Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after 1163 the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

Medical Examination

8. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and 1164 also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

Immediate Payment of Indemnities

9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid immediately after receipt of due proof.

1165 Monthly Indemnity Payable in Installments

10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

1166 To Whom Indemnities Payable

11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured.

Less Hazardous Occupation

1167

12. If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

Rights of the Beneficiary

13. Consent of the Beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary or to any other changes in the policy.

1168 Limitation of Time for Bringing Suit.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

1169 Limitations Controlled By Statute

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

1170 Cancellation by Company

16. The Company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last address, as shown by the records of the Company, together with cash or the Company's check for the unearned portion of the premiums actually paid by the Insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

1171 Age Limits of Policy

20. The insurance under this policy shall not cover any person under the age of sixteen years nor over the age of sixty years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

Additional Provisions

Exceptions

21. Accident Benefits cover freezing and unprovoked assaults (including assaults of burglars and robbers), but
1172 neither Accident nor Sickness Benefits cover loss or disability resulting directly or indirectly, in whole or in part from, pregnancy; suicide, sane or insane, or any attempt thereat, sane or insane; any disease of the generative organs any bodily injury, fatal or non-fatal, sustained, or sickness contracted by the Insured while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith, or while operating or handling any such vehicle
1173 or device; bodily injury or sickness caused directly or indirectly by war or by any act of war, or any injury happening or any sickness contracted while the Insured is engaged in military or naval service in time of war; bodily injury sustained or sickness contracted or suffered while the Insured is outside Continental United States of America (not including Alaska or the Panama Canal Zone) or Canada. Accident Benefits do not cover death or disability caused or contributed to, directly or indirectly, wholly or

1174 partly by ptomaines or bacterial infection (except Pyogenic infection which shall occur simultaneously with and through an accidental cut or wound).

Accident and Sickness Non-Participating

22. This "Accident and Sickness Benefits" policy and the premium charged therefor shall not share in the surplus earnings of the Company.

1175 Occurrence of Loss

23. Upon the occurrence of any one of the losses described in clause "a", all insurance hereunder except as respects such loss shall immediately cease, and upon payment of the benefit for such loss payable hereunder, this policy shall be surrendered to the Company. Any failure to comply with the provisions of this policy shall render invalid any claim under this policy.

Cancellation by Insured 1176

24. This policy may be cancelled at any time by the Insured filing this policy for cancellation, together with written notice, at the Home Office of the Company at Los Angeles, but such cancellation shall be without prejudice to any claim originating prior thereto.

Beneficiary

25. Indemnity for loss of life of the Insured is payable to Cora Lord Copp, Wife of the Insured, or in the event that she shall die before the Insured, to Andrew James Copp, III, and Jane Pendexter Copp,

1177 Children of the Insured, equally or to the survivor, Beneficiary. No assignment of interest under this policy and no change of beneficiary shall bind the Company unless consent thereto, duly signed by an executive officer of the Company is formally endorsed hereon. The Company shall not be responsible for the validity of any assignment or change of beneficiary. No provision of the charter, constitution or by-laws of the Company not included herein shall avoid
1178 the policy or be used in evidence in any legal proceeding hereunder.

Days of Grace

26. A grace of thirty-one days shall be granted for the payment of every premium renewing this policy.

In Witness Whereof, The Pacific Mutual Life Insurance Company Of California has, by its proper officers, signed this Contract at the City of Los Angeles, but the policy shall not be binding upon the Company until countersigned by a
1179 duly authorized Agent or Manager of the Company.

Examined F. E.

J. E. MILLER
Assistant Secretary

GEORGE J. COCHRAN
President

Countersigned at Los Angeles Calif. 7/21/22 as of the day and year first written above.

No. 464140

J. N. RUSSELL
Authorized Agent or Manager

WL

1180 NON-CANCELLABLE INCOME POLICY

This policy provides indemnity for loss of time through accidental means, and for loss of time by sickness; to the extent herein provided.

Founded 1868

The Pacific Mutual Life Insurance Company
of California
(herein called company)

Hereby Insures Andrew James Copp, Jr. (herein
1181 called Insured and described in the Application), subject to all provisions and limitations herein contained:

Against disability commencing while this policy is in force and resulting from bodily injury effected through accidental means; and against disability commencing while this policy is in force and resulting from sickness; such disability, in both cases, to be such as will result in continuous, necessary and total loss of all business time; as
1182 follows:

Disability

Part A. The Company will pay indemnity at the rate of Three Hundred Dollars per month during the continuance of disability as defined above, provided, however, that no indemnity shall be paid under this Part A or under Parts B, C or D, for the first* three months of any period of disability.

1183 Loss of Both Hands, Both Feet, Hand and Foot or the Sight of Both Eyes

Part B. Should the Insured suffer, as a direct result of such injury or such sickness, the loss of both entire hands by complete severance at or above the wrists, or the loss of both entire feet by complete severance at or above the ankles, or the loss of one entire hand by complete severance at or above the wrist and one entire foot by complete severance at or above the ankle, or the irre-
1184 coverable loss of the entire sight of both eyes, he shall be deemed to have sustained a permanent disability resulting in continuous, necessary and total loss of all his business time and the Company will pay indemnity at the rate per month specified in Part A as long as he shall live, or;

Loss of One Hand or One Foot

Part C. Should the Insured suffer, as the direct result of such injury or such sickness, the
1185 loss of one entire hand by complete severance at or above the wrist, or the loss of one entire foot by complete severance at or above the ankle, the Company will pay indemnity at the rate per month specified in Part A for the period during which such loss causes disability as defined above, and at the termination of such disability will consider such loss to have caused a permanent disability of 25%, and will pay the Insured, as long as he shall live, monthly indemnity at the rate of 25% of the amount specified in Part A, or;

1186 Loss of the Sight of One Eye

Part D. Should the Insured suffer, as the direct result of such injury or such sickness, the irrecoverable loss of the entire sight of one eye, the Company will pay indemnity at the rate per month specified in Part A for the period during which such loss causes disability as defined above, and at the termination of such disability will consider such loss to have caused a permanent disability of 10%, and will pay the Insured, as long
1187 as he shall live, monthly indemnity at the rate of 10% of the amount specified in Part A.

*No indemnity is payable under this policy for the specified first part of any period of disability.

Form A 292—Renewable *Thourgh* Age 60

Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire
1188 contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured or contracts sickness after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Com-

1189 pany will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

If the law of the state in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having super-
1190 vision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Company is liable.

2. No statement made by the applicant for
1191 insurance not included herein shall avoid this policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by

1192 any of its duly authorized agents shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from
1193 such sickness.

5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at its Home Office, 501 West Sixth Street, in the City of Los Angeles, California, or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall
1194 be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon

1195 submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Company at its said office within ninety days after the termination of the period of disability for which the Company is liable.

8. The Company shall have the right and opportunity to examine the person of the Insured
1196 when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Company is liable, and any balance remaining unpaid at
1197 the termination of such period will be paid immediately upon receipt of due proof.

11. All the indemnities of this policy are payable to the Insured.

12. If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

17. If the Insured shall carry with another company, corporation, association or society other insurance covering the same loss without giving written notice to the Company, then in that case the Company shall be liable only for such portion of the Indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premium paid as shall exceed the pro rata for the indemnity thus determined.

18. Upon the payment of claim hereunder any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

19. If a like policy or policies, previously issued by the Company to the Insured be in force

1201 concurrently herewith, making the aggregate indemnity for loss of time on account of disability in excess of $250.00 weekly, the excess insurance shall be void and all premiums paid for such excess shall be returned to the Insured.

20. The insurance under this policy shall not cover any person under the age of eighteen years nor over the age of sixty years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

1202 Additional Provisions

21. This insurance does not cover, (1) any disability for which the Insured is not necessarily and regularly attended by a legally qualified physician other than the Insured; provided, however, that this requirement shall be waived in the event such attendance is declared by medical authority satisfactory to the Company to be unnecessary; (2) women; (3) disability resulting wholly or partly, directly or indirectly from (a) 1203 bodily injury sustained or sickness contracted while the Insured is engaged in military or naval service in time of war; (b) bodily injury or sickness caused by war or any act of war; (c) bodily injury sustained, or sickness contracted by the Insured while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith, or while operating or handling any such vehicle or device; (d) bodily injury sustained or sickness contracted

except while the Insured is within Canada or Europe or the United States (not including Alaska, Panama Canal Zone or the insular possessions of the United States), or while traveling between them by regular lines of passenger conveyance (not including aerial conveyance).

22. No recovery shall be had on account of disability from sickness for any period of time for which the Insured is entitled to indemnity for bodily injury under any policy in this Company, except in the event of payment of claim for indemnity on a percentage basis as provided in Parts C or D, but in no event shall indemnity be payable under this policy at a rate per month in excess of that specified in Part A. Failure to comply with any of the provisions of this policy shall render invalid any claim under this policy.

23. After the first twelve months of disability, no indemnity shall be payable for any period of disability during which the Insured is not continuously within the United States (not including Alaska, the Panama Canal Zone or the insular possessions of the United States) unless a written permit to reside elsewhere be granted by the Company.

24. The insurance under this policy does not cover the Insured after he passes the age of sixty years, but until that time he shall have the right to renew this policy from year to year by the payment of the premium as herein pro-

vided. All premiums are due and payable on or before the anniversary date of this policy either at the Home Office of the Company in the City of Los Angeles or to any authorized agent of the Company, but a grace of thirty-one days shall be granted for the payment of every premium after the first, during which time the insurance hereunder shall continue in force. No premium receipt is valid unless signed by the President or a Vice President or the Secretary or an Assistant Secretary of the Company. After any default in payment of premium this policy may be reinstated as provided in Standard Provision Number 3 at any time within six months from the date of such default on written application by the Insured to the Home Office of the Company and the payment of the defaulted premium, provided the Insured shall with such application submit evidence of insurability satisfactory to the Company.

25. Indemnity for disability will not be paid under this policy at a rate in excess of the average earnings of the Insured for the period of time that he has been actually employed during the two years immediately preceding the commencement of the disability for which the Company is liable, and all premium paid during said two years for that portion of the disability indemnity in excess of the amount of such earnings will be returned upon request of the Insured. The Insured shall have the right to reduce all or any of the indemnities of this policy

on any anniversary of the date hereof and upon his request and temporary surrender of the policy for endorsement, the Company will endorse it, making such reduction of indemnities and a proportionate reduction in premium.

26. At any time during the life of this policy, if the Insured changes his occupation to one different from that stated in this policy, the Company hereby agrees upon the surrender of this policy to issue in lieu thereof upon the written request of the Insured, a new policy containing the same provisions as this policy except a change in the amount of the benefits payable, the new policy to provide such an amount payable for disability as the premium paid for this policy will purchase at the rates but within the limits fixed by the Company for such different occupation.

If the age of the Insured has been mis-stated, any amount payable under this policy shall be that amount which the premium paid would have purchased at the rate fixed by the Company for the Insured's correct age.

27. The Insured is by occupation an Attorney-at-Law classified Preferred by the Company.

No assignment of interest under this policy shall bind the Company unless consent thereto, duly signed by an executive officer of the Company, is formally endorsed hereon. The Company shall not be responsible for the validity of any assignment.

28. This insurance is effective in consideration of the payment in advance of the premium of Eighty-seven Dollars and of the payment of a like premium on the Twenty-sixth day of July in each year during the continuance of this Policy, and in further consideration of the statements made in the application for this policy, copy of which application is endorsed hereon or attached hereto, and is hereby made a part of this Policy. The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made with intent to deceive shall bar all right to recovery under this policy. No provision of the charter, constitution or by-laws of the Company not herein set forth shall be used in defense of any claim arising under this policy.

In Witness Whereof, the Company has, by its proper officers, signed this Contract in the City of Los Angeles and caused same to be countersigned by its authorized Agent or Manager, as of the Twenty-sixth day of July, 1922.

Examined SB

George J. Cochran
President

S. F. McClung
Secretary

Countersigned The Paschall-Jones Company
By Jack Paschall
Authorized Agent or Manager

M. A. Y.

1216 Attached thereto:

Application for Insurance—Accident Department

The Pacific Mutual Life Insurance Company of California

I hereby apply for Non-Cancellable Income Insurance, to be based on the following representations and the answers that I shall make to the Company's Medical Examiner in continuation
1217 of this application.

Kindly use Black ink as this blank is to be photographed.

1. What is your full name? (Please print) Andrew James Copp, Jr.

2. Where do you reside? No. 314 S. Union Ave. Street Town Los Angeles State Calif.

3. Where and when were you born, and what is your age? Town Millerton State or Country New York Month Oct. Day 15" Year
1218 1880 Age 42 Years.

4. What is your occupation? (Describe fully) Lawyer

5. What are the duties required of you? (Describe fully, stating kind of goods) Usual duties.

6. What is the name of your employer? Self

7. What is the nature of your employer's business?

1219 8. What is the location of your employer's place of business? No. 412 Copp Building Street Town Los Angeles State Calif.

9. Whom do you designate as beneficiary under policy applied for, and what relationship is such beneficiary to you? (Please print) If for Disability Benefits only, write "None" Relationship None

10. Does the disability indemnity applied for in this and other companies or associations to-
1220 gether with other insurance now held by you exceed your average monthly earnings? No.

11. Are your habits of life correct and temperate? Yes

12. (a) Have you any insurance against accidents or sickness in other companies or associations? (Name company, amount and disability indemnity). Ocean, $25 a week accident and sickness, will expire Oct. 13.

12 (b) Have you any life, accident or sick-
1221 ness insurance in this Company? (Give numbers and amounts) $10,000 Life with $200 monthly disability benefits now pending.

12 (c) Have you any life insurance in other companies or associations? Company U. S. Government Travelers

Amount	Plan of Insurance	Year Taken
$10,000.	Term	1918
5,000.	20-payment Life	1917

13. Have you ever made application for life, accident or sickness insurance upon which you

1222 have not been notified of the action taken, or has any application ever made by you for life, accident or sickness insurance been declined or postponed, or has any policy of accident or sickness insurance issued to you been cancelled or renewal refused by this or any other company or association? (Give particulars) no.

14. Have you ever received or been refused compensation for accidental injuries or sickness, or have you any claim now pending? (Give par-
1223 ticulars) Dec. 1912, bruised shoulder, 1 week $25. 1916—deep cut on finger, 1 week $25.

15. Have you ever had or have you now any bodily or mental infirmity or deformity (including hernia and rupture), or have you impaired hearing, any disease of either eye, lost a limb or the sight of an eye, or are you in any respect maimed or in unsound condition mentally or physically? (Give particulars) No.

16. Have you in contemplation—any hazard-
1224 ous undertaking—any special journey—or any traveling outside the United States? (Give particulars) No.

17. Do you agree that the falsity of any answer in this application for insurance or any answer made to the Company's Medical Examiner in continuance of this application for insurance shall bar the right to recover thereunder if such answer is made with intent to deceive or materially affects either the acceptance of the

risk or the hazard assumed by the Company? Yes.

18. Do you agree that if entire amount of annual premium for the insurance applied for is not paid in cash at time of making this application, there shall be no liability on the part of the Company under this application unless nor until a policy is issued and delivered to you and entire amount of such annual premium actually paid in cash during your lifetime and while you are in good health and free from injury, and do you further agree that if entire amount of such annual premium is paid in cash to the Company's agent at time of making this application, insurance (subject to the provisions of the Company's regular policy of the form applied for) shall be effective from date of medical examination for said insurance, provided the Company in its judgment shall be satisfied as to your insurability under form of policy applied for, on date of such examination, and do you further agree that if the Company shall not be so satisfied, entire amount of premium paid, without interest, shall be returned? Yes.

Dated at Los Angeles this 15" day of July 1922.

Signed in the presence of Maude Ross Ferguson Soliciting Agent

ANDREW JAMES COPP, JR.

Applicant's own signature in full

1228 Statement to be signed by applicant for cash paid to agent No. 133934 I Hereby Declare that I have paid to ..... Agent of The Pacific Mutual Life Insurance Company of California ..$..... Dollars in cash, and that I hold his receipt for same, written on receipt form detached from and corresponding in date and number with this application.

ANDREW JAMES COPP, JR.
Applicant's own signature in full

1229 Date..... 19.....

Receipt Detached
At Home Office

Form A-1442-W

Kindly use Black ink as this blank is to be photographed.

Answers must be explicit and in the handwriting of the Examiner. Check marks or dashes do not constitute an answer.

1230 Questions To Be Asked By The Medical Examiner

(This examination must be made in private by a regularly appointed Medical Examiner, no Agent or other third person being present)

In continuation of and forming a part of my Application for Insurance to The Pacific Mutual Life Insurance Company of California.

1. A. Where have you resided during summer and winter of last ten years? A Calif. 464140

1231 B. Have you ever changed or been advised to change your occupation or residence to benefit your health? B No

2. A. How much of each of the following alcoholic beverages do you use daily? A Spirituous None beer None Wine None.

B. Have you ever used them to excess? (Give particulars.) B No

C. Have you ever used opium, cocaine or any other drug? C No

1232 D. Have you ever taken treatment for liquor or drug habit? If so, when and where? D No

E. If a total abstainer, how long so? E Always

F. Have you ever engaged in the manufacture or sale of wines, spirits or malt liquors? When and how long? F No

3. A. Has any one in your family committed suicide or suffered from Cancer, Epilepsy
1233 or Insanity? (Details each such case.) A Brother dec'd Traumatic Insanity Worcester State Institution Mass.

B. Has any one in your family or in your immediate household ever suffered or died of Consumption or any other contagious disease? (Details each such case.) B No.

4. A. Has any Insurance or Assessment Company or Fraternal Society ever refused you Insurance, or limited or postponed your

1234 Application? (Details each such case.) A No

B. Have you ever applied for Insurance without getting the Policy, or have you any other Application now pending? B. No.

C. Have you ever applied for a pension or Government Compensation? If so, give the cause for each such claim. C. No

5. Have you ever had or been treated for: Yes or No

1235

A. Apoplexy, Paralysis, Epilepsy, Dizziness, Mental Derangement? No

B. Asthma, Shortness of Breath, Chronic Cough, Spitting of Blood? No

C. Influenza, Pneumonia, Pleurisy, Bronchitis, Tuberculosis? No

1236

D. Disease of Heart or Blood Vessels, Sunstroke, Nervous Prostration? No

E. Gastric or Duodenal Ulcer, Indigestion, Appendicitis, Piles, Fistula? No

F. Liver, Kidney or Bladder Disease, Sugar or Albumin in Urin? No

Give name, history, date and duration of each disease or Symptom.

1237 G. Colic, Gravel, Gall Stones, Jaundice, Malarial or other Fevers? No

H. Cancer, Tumor, Open Sores, Goitre, Enlarged Glands, Skin Disease? No

I. Locomotor Ataxia, Lumbago, Gout, Rheumatism, Syphilis? No

J. Difficulty with Sight or Hearing, Discharge from the ear? No

1238

K. Have you ever had a surgical operation? No

L. Have you given full information about each disease or sympton mentioned above which you have ever had or been treated for? Yes

6. Have you had any injuries or illnesses or consulted or been treated by any physician or practitioner during last seven years? No.

1239

Give particulars each illness, Injury, Consultation and Treatment Date Duration Result Physician's Name and Address

7. Hase your weight in the past year
(Increased? No How much? None lbs.
(Diminished? No

8. Are you now in good health? Yes.

9. Family Record?

1240

	Age if living	State of health; if not good give full details
Father	76	good
Mother	68	good
Bt Number		
rh Living (2)	36)	
oe	40)	good
-r Number		
s Dead (1)		

1241

Age at Death	Cause of Death; give full details	Date of Death	How Long sick
27	est Phenmonia	1906	A few days
St Number			
ie Living (0)			
sr Number			
-s Dead (1)			
Age at Death	Cause of Death; give full details	Date of Death	How Long sick
10	Diptheria	1896	4 days

10. A. Ages attained by Grandparents? Father's Father 45 est Father's Mother 89

1242 Mother's Father 50 est Mother's Mother 76 est.

B. Have any of your grandparents suffered or died of Consumption or apoplexy? (Details) No.

Dated at Los Angeles, Calif. this 15 day of July 1922

ANDREW JAMES COPP, JR.
Applicant's own signature in full

Witness Allen L. Winter M.D.
Medical Examiner

Form 4325B

1243 Passenger Air Travel Amendment No. 5129131

The Pacific Mutual Life Insurance Company of California

Accident Department

Indemnity as provided by this policy will be paid to the extent of the minimum amount provided in the policy for any loss specified therein resulting from bodily injury sustained while the Insured is riding as a fare-paying passenger
1244 in a licensed commercial air craft provided by an incorporated common carrier for passenger service, and while such air craft is operated by a licensed transport pilot and is flying in a regular civil air way between definitely established air ports.

Except as above provided nothing herein contained shall be construed as changing, altering or amending any aeronautical or aviation exclusion clause which may be contained in the policy
1245 or any other condition or provision of the policy. Nothing herein contained shall be construed as entitling the Insured to recover under the Double Indemnity feature, if any, of the policy.

Not valid unless countersigned by a duly authorized Agent or Manager and attached to and made part of Accident or Disability Policy bearing No. 4633015 issued to Mr. Andrew James Copp, Jr.

S. J. McClung
Secretary

George J. Cochran
President

1246 Countersigned and dated at Los Angeles this 10th day of September 1928

Pascall-Jones Company
By Jack *Paschall*
Authorized Agent or Manager

Form A2243 5127001—5129500

On back:

No. 4633015

The Pacifi. Mutual
Life Insurance Company
1247 of California
Non-Cancellable
Income Policy
Form A 292
Renewable through age sixty
Issued To
Andrew James Copp, Jr.

This policy provides indemnity for loss of time through accidental means, and for loss of time by sickness; to the extent herein provided.

1248 No indemnity is payable under this policy for the first part specified herein of any period of disability.

Please read your policy

The Pascall-Jones Co.
General Agents
Jack Paschall, Manager
Accident and Health Insurance
Ninth Floor W. P. Story Bldg.
Phone Pico 1626

1249 State of California, County of Los Angeles—ss.

Andrew J. Copp, Jr. being by me first duly sworn, deposes and says: that he is the Intervenor in the above entitled action; that he has read the foregoing complaint in intervention and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he
1250 believes it to be true.

Andrew J. Copp, Jr.

Subscribed and sworn to before me this 12th day of August, 1936.

[Seal] L. E. LAMPTON,
County Clerk

A. G. STANHAM,
Deputy Clerk

1251 Endorsed: Received copy of the within petition this 12th day of Aug., 1936, U. S. Webb, Attorney General; by John L. Flynn, deputy, attorney for petitioner. Received copy of the within complaint this 12th day of August, 1936. O'Melveny, Tuller & Myers; by Homer I. Mitchell, attorneys for Pac. Mutual Life Ins. Co.

Filed Aug. 12, 1936, 11:00 a. m. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

1252 [TITLE OF COURT AND CAUSE.]

Complaint in Intervention to Set Aside and Vacate All Orders of the Court Made Herein Upon the Petition of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, The Pacific Mutual Life Insurance Company of California, a Corporation, and the Pacific Mutual Life Insurance Company.

1253 Comes now Neil S. McCarthy and by leave of Court files this his complaint in intervention herein and for cause of action and intervention alleges:

I.

That at all times herein mentioned, the intervenor was and is the owner and holder of policy numbered 4641696 issued by the respondent, the Pacific Mutual Life Insurance Company of Cali-
1254 fornia, a corporation.

II.

That at all times the Pacific Mutual Life Insurance Company of California was and is a corporation organized under the laws of the State of California and has had and still has its principal place of business in the City of Los Angeles, County of Los Angeles, California. That, for the purpose of brevity, said corporation is hereinafter referred to as the "old company".

III.

1255 That at all times herein mentioned, Pacific Mutual Life Insurance Company was and is a corporation incorporated under the laws of the State of California with its principal place of business in Los Angeles, County of Los Angeles, California, and, for the purpose of brevity, this corporation is referred to as the "new company".

IV.

1256 That Samuel L. Carpenter, Jr. is the duly appointed, qualified and acting Insurance Commissioner of the State of California.

V.

"That on or about July 22, 1936, the Insurance Commissioner of the State of California filed in this Court an application for an order appointing him Conservator of said old company and thereafter on the same day, an order of said Court
1257 was made and entered, under and by virtue of the terms of which said petitioner was appointed Conservator of said old company and of its business, assets and affairs and that said petitioner was ordered to take possession forthwith of all books, records, property and assets of said old company and as Conservator to conduct its business for the benefit of its policyholders, creditors and stockholders and of the public in general.

That on said July 22, 1936, an application for an order to liquidate was filed and on said

1258 same day an order of court was made and entered, under and by the terms of which said Commissioner was appointed Liquidator of the assets and business of said old company, and of all the right, title and interest of said old company in and to its assets and property was vested and confirmed in said petitioner as Liquidator and said petitioner as Liquidator was ordered to conduct, manage and operate the business of said old company, to wind up and liquidate its
1259 business and to formulate, prepare and submit forthwith, if possible, for the approval of said court, a plan and agreement of reinsurance and rehabilitation or sale and transfer of said assets. On said same day, a petition was filed asking for an order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of said old company and thereafter and on the same day an order of said court was made and entered approv-
1260 ing said proposed plan and agreement, ordering said Commissioner forthwith to organize a new company and to subscribe to its capital stock by the use of funds and assets under his control as Liquidator of said old company, authorizing him forthwith to execute an agreement in form substantially as set forth in said plan, ordering said Commissioner to forthwith transfer and set over to said new company all of the assets of the old company except the stock of said new com-

1261 pany and except any claims which the company might have against any of its present or past officers, directors or employees or against any other person by reason of wrongful or illegal acts or omissions of any such present or past officers, directors or employees, authorizing and ordering said Commissioner to do any and all things necessary, desirable or proper to carry out the terms of said plan and agreement and directing the officers, agents and employees of the old com-
1262 pany to cooperate with said Commissioner and the new company in closing of said plan by the execution of such documents and doing of such acts as might be requested by said Commissioner.

That on said day a petition for the approval of an amendment to said plan was filed and granted and an order made approving said amendment, whereupon the assets of the old company, with the exception above referred to, were transferred and conveyed to the new company
1263 and that said new company has been and now is in the sole and exclusive possession of the same and has been and now is conducting a business of insurance heretofore conducted by the old company.

VI.

That no notice of any of said matters was given to this intervenor and there was no impartial or independent appraisal or investigation into the affairs made by the court previous to the making of said order.

1264 VII.

That intervenor is informed and believes that the old company was not insolvent and alleges that said sale and transfer is not for the best interests of all concerned, and alleges on information and belief that a much better sale can be made even if the old company is distressed financially; that said plan is unfair and inequitable, is in disregard of the rights of the in-
1265 tervenor, would jeopardize the holdings of assets by the new company as security for the payment of the non-cancellable policy of intervenor; that Article XIV, Chapter 1, Part 2 of the Insurance Code is void and that it permits and authorizes proceedings that deprive the intervenor of his property without due process of law.

VIII.

That all of the orders heretofore made in this
1266 cause are against the best interests of said old company, its policyholders and particularly holders of non-cancellable policies, such as intervenor. Intervenor alleges upon information and belief that said rehabilitation, sale and transfer plan of said old company with said new company is not the best practice plan for the protection of the policyholders of the old company as was represented by petitioner in his said application for

said sale, but intervenor alleges upon information and belief that it is for the special benefit of certain stockholders of the old company and not for the interests of the policyholders of the same. Intervenor alleges that under said plan the protection and value of his policy of insurance, together with that of all other policies of insurance issued by the old company and particularly of the class of that to which intervenor belongs, will be greatly lessened and impaired. That intervenor alleges, upon information and belief, that, if said sale and transfer of said assets from said old company to said new company be set aside and the orders heretofore made vacated and annulled that, upon proper and timely notice, the assets of said old company may be sold to interested parties without any loss of any of the rights of any of the stockholders herein interested. Intervenor alleges upon information and belief that, if this matter be fully advertised and the assets placed on sale to the highest and best bidder, the interest of intervenor and other policyholders similarly situated will be more fully and adequately protected.

IX.

That the orders and decrees herein referred to above are of no force or effect for the reason

1270 that no notice of said hearing of motions for said orders were had or given, as required by Section 1016 of the Insurance Code of the State of California. Intervenor alleges upon information and belief that said orders were all signed ex parte and without notice to policyholders, in direct violation of said Section 1016 of said Insurance Code.

X.

1271 Intervenor further alleges upon information and belief that said old company has not been and is not insolvent within the terms and provisions of the Insurance Code of California, that the orders, judgments and decrees herein referred to above entered on behalf and at the request of the said Commissioner are unlawful and void and of no force and effect for the reason that each of them was and is a violation of intervenor's rights under the following provisions of the Constitution of the State of California:

1272

Sections 7, 11, 13, 16, 21, 22 of Article I;

Section 1 of Article III; and

Section 1 of Article XII.

That the orders, judgments and decrees herein referred to are void and of no force and effect for the reason that each of them was and is in

1273 conflict with Section 1 of the 14th amendment to the Constitution of the United States.

XI.

That the policy held by intervenor is a non-cancellable income policy and has been issued and in force since September 8, 1923 and that each and every of the annual premiums thereon have been paid from that time until the present time.

1274 Wherefore, intervenor prays judgment as follows: That the Court may make its orders vacating and setting aside all orders of the Court hereinbefore made herein upon the petition of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, the Pacific Mutual Life Insurance Company of California, a corporation, and the Pacific Mutual Life Insurance Company, a corporation; that said peti-
1275 tioner take nothing by his application for rehabilitation and sale of the assets of said corporation known as the old company; and for an order setting aside and vacating the order permitting, authorizing and approving a sale and transfer of the assets of said old company and setting aside the order approving the reinsurance plan of said old company, and for an order setting aside all other orders of whatsoever kind or nature made to date in and about said plan of

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1276 reinsurance, liquidation and conservation of the assets of said old company; and for such other and further orders as to this court may seem just and equitable in the premises.

LEROY ANDERSON,
NEIL S. MCCARTHY,
Attorney for intervenor, Neil S. McCarthy.

State of California, County of Los Angeles—ss.

1277 Neil S. McCarthy being by me first duly sworn, deposes and says: that he is the intervenor in the above entitled action; that he has read the foregoing complaint in intervention and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

1278 NEIL S. MCCARTHY.

Subscribed and sworn to before me this 12th day of August, 1936.

(Seal) WILLIAM EMPEY, JR.,
Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed Aug. 12, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy.

1279 [TITLE OF COURT AND CAUSE.]

Intervening Petition of Wilber G. Katz, Norman Crawford and Robert A. Crawford Objecting to the Plan and Agreement of Rehabilitation and Reinsurance for Respondent Heretofore Presented to the Court.

Now come Wilber G. Katz, Norman A. Crawford and Robert A. Crawford, on behalf of
1280 themselves and all other policyholders of The Pacific Mutual Life Insurance Company of California, respondent, similarly situated constituting a class of persons too numerous to be joined in this petition, by Bell, Boyd & Marshall and Newlin & Ashburn, their attorneys, and respectfully represent to the court as follows:

1. Petitioners all reside in the City of Chi-
1281 cago, County of Cook and State of Illinois and are residents of that State. On the respective dates set forth below, respondent issued to each of them its "non-cancellable income policy, insuring them against loss of time through accidental means, and for loss of time by sickness," in the respective indemnity amounts for total loss of time under the respective policy numbers set forth below:

1282

Date of Issuance of Policy	Name of Insured (Petitioner)	Number of Policy	Indemnity Rate for Total Loss of Time
September 14, 1928	Wilber G. Katz	5,515,757	$200 a month.
March 23, 1931	Norman Crawford	5,613,144	$150 a month.
November 18, 1930	Robert A. Crawford	5,612,322	$ 25 per week.
May 15, 1933	Robert A. Crawford	5,637,353	$ 25 per week.

Each of said policies contain a provision in substantially the following language: "The In-
1283 sured shall have the right at the time of such expiration [one year from its date] to renew this policy for a term of [specified] years by the payment of a like premium on the [day of issuance] in each succeeding year, provided, however, that this policy shall not be renewed beyond its anniversary date nearest the sixtieth birthday of the Insured." The number of years specified during which the insured has the right of renewal, in the case of Wilber G. Katz is 33
1284 years, in the case of Norman Crawford is 28 years, and in the case of Robert A. Crawford is approximately 27 and 24 years under his respective policies. Petitioners have paid all premiums falling due under each of said policies (several hundred dollars per policy with one exception), and said policies are all now in full force and effect.

2. Said policies were all issued by The Pacific Mutual Life Insurance Company of California as

1285 the general obligations of that company, and contained no provisions limiting the contractual liability of the company to the class of business covered by the policy written. A photostatic copy of policy No. 5,515,757, issued to petitioner Wilber G. Katz, is attached hereto and made a part hereof as Exhibit A, and petitioners state that the general provisions of each of their policies are substantially in the same form as said Exhibit A

1286 3. Petitioners are informed and believe, and upon such information and belief state the fact to be, that the respondent has issued many thousands of said policies throughout the United States and the State of Illinois, and that the holders of the same similarly situated to your petitioners are many thousands in number and constitute a class of persons too numerous to be made parties individually to this petition, or in the above entitled proceedings, and your peti-
1287 tioners therefore bring this petition not only in their own behalf but on behalf of all the other persons constituting said class.

4. Your petitioners state that a few days prior to the date of the execution of this petition (August 10, 1936) they read in the public press accounts of the receivership and liquidation proceedings instituted by petitioner against respondent in this court, and that upon inquiry to the company they were advised by respondent

1288 that a plan of rehabilitation was in the process of being adopted which would to some as yet undetermined extent alter and change their rights under their policies. Not until August 7, 1936 did petitioners, or their counsel, read in the public press that objections to the plan of reorganization must be filed by order of court on or before August 12, 1936. Not until August 10, 1936 were petitioners advised of the various proceedings which were had in this court July 22, 1936
1289 and of the proposed plan of rehabilitation and reinsurance which was presented to the court as Exhibit A to Commissioner's petition. Petitioners are informed and believe and therefore state the fact to be, that the only public notice of proceedings was given by newspaper advertisement in newspapers published in the Cities of Los Angeles and San Francisco, in the State of California, and that no publication or notice by mail of the rule requiring objections to be filed by
1290 August 12, 1936 was made in the State of Illinois, where several thousands of similar policies are held. Your petitioners state that due to the limited time they and their counsel have had since the proceedings and the rule of court above mentioned have come to their attention, they will be unable to proceed at the hearing on objections which they are informed is set for August 12, 1936, and therefore respectfully request that a short continuance be granted so that they may

1291 be heard upon their objections to the plan and agreement which are hereinafter set forth.

5. Your petitioners are further informed that petitions or other papers have been filed in the above entitled proceedings purporting to show that the respondent is insolvent, and that it is proposed to correct such condition of insolvency by the plan and agreement of rehabilitation and reinsurance heretofore presented to the court as Exhibit A to petitioners' petition by providing
1292 in paragraph 7 thereof that the obligation of the new company with respect to the payment of monthly disability benefits on claims either filed or notice of which is filed with the new company at any time after the date of liquidation under non-cancellable policies, should be limited to the payment of certain percentages of the monthly disability benefits originally provided under the policies. Such percentages applied to the policies of your petitioners will have the
1293 effect of reducing the contractual obligation of the insurer to pay such benefits, in the case of petitioner Wilber G. Katz by 55%, in the case of petitioner Norman Crawford by 45%, and in the case of petitioner Robert A. Crawford with respect to policy 5,612,322 by 45% and with respect to policy 5,637,353 by 10%. Your petitioners are further informed and believe that said plan and agreement of rehabilitation and reinsurance provides for no lien upon or other im-

1294 pairment of the insurer's contract in the case of any other outstanding insurance obligation of respondent, except those provisions with respect to the non-cancellable health and accident policies above referred to, and held by your petitioners.

6. Your petitioners hereby object to said plan and agreement for the rehabilitation and reinsurance of the business of respondent, and respectfully ask that the same be not finally approved by the court for the following reasons:

1295 (a) Said plan and agreement fails to take account of the fact that upon the entry of an order of liquidation all the holders of policies of respondent are creditors of the company upon an equal footing without rank or priority between themselves;

(b) Said plan and agreement is not in accord with Section 1033 of the California Insurance Code providing that "claims allowed in a proceeding under this article shall be given 1296 preference in the following order:

1. Expense of administration;

2. Claims having a preference by the laws of the United States or of this State;

3. All other claims;"

in that the claims based upon policies held by your petitioners and others similarly situated have an equal ranking with the ordinary life policies and other insurance policies issued by respondent;

1297 (c) Said plan and agreement either violates the principal of general law referred to in subparagraph (a) above, and recognized in the provisions of the Code referred to in subparagraph (b) above, or, in the alternative, if the rehabilitation and reinsurance sections of the Insurance Code be construed to permit such preference among policyholders of the company, then any such construction of said sections violate the provisions of the Fourteenth Amendment of the
1298 Constitution of the United States and the Constitution of the State of California, prohibiting the taking of property without due process of law and prohibiting the passing of any law which impairs the obligation of a contract.

(d) Said plan and agreement grant unto all other policyholders and other creditors of respondent illegal and inequitable preference in the assets of respondent sought to be passed to the new company, as against the rights of your
1299 petitioners and other policyholders similarly situated holding respondent's non-cancellable health and accident policies;

(e) Said plan and agreement is unfair, inequitable, and, as regards your petitioners and those policyholders, similarly situated, constitutes in law an attempt to hinder, delay and defraud them of their rights as such creditors, in that said plan and agreement seeks to transfer all the assets of respondent company to a new corpora-

1300 tion to be formed for such purpose, which, while assuming all other outstanding obligations of respondent, nevertheless assumes only a part of the contractual obligation of respondent to your petitioners and other policyholders similarly situated under said non-cancellable health and accident policies;

(f) The actions of the company and of the petitioner in these proceedings, the Insurance
1301 Commissioner of the State of California, are unwarranted in law as applied to your petitioners' rights and those of similar policyholders, and amount to a taking of your petitioners' and such other policyholders' property without due process of law, in violation of the Constitution of the United States and of the State of California.

Wherefore, your petitioners respectfully pray
1302 that they may be given leave to intervene in these proceedings and file this their intervening petition and objections to said plan and agreement; that upon the hearing of said objections, which they ask may be set on some reasonably short day after August 12, 1936, said plan and agreement may be disapproved by the court, and that in lieu thereof a plan and agreement may be adopted which will treat all creditors and policyholders of respondents on an equitable basis in accordance with law, and that they may have

such other and further relief in the premises as to the court should seem meet.

WILBER G. KATZ,
NORMAN A. CRAWFORD,
ROBERT A. CRAWFORD,
By BELL, BOYD AND MARSHALL,
NEWLIN & ASHBURN,
Their Attorneys.
BELL, BOYD AND MARSHALL,
NEWLIN & ASHBURN,
Their Attorneys.

State of Illinois, County of Cook—

Wilber G. Katz, being first duly sworn, on oath states that he is one of the petitioners named in the foregoing petition by him subscribed; that he has read the same, and that the statements therein contained are true in substance and in fact, except those matters which are stated to be made upon information and belief, and as to those he believes them to be true.

WILBER G. KATZ.

Subscribed and sworn to before me this 10th day of August, 1936.

(Seal) HELEN HILL.
Notary Public.

State of Illinois, County of Cook—ss.

I, Helen Hill, do hereby certify that I am the Notary Public who took the verification of the petitioner named in the foregoing petition to said petition, and that I am duly authorized by

1306 the laws of the State of Illinois to administer oaths.

In Witness Whereof I have hereunto set my hand and notarial seal this 10th day of August, A. D. 1936.

(Seal) HELEN HILL.

State of Illinois, Cook County—ss.

I, Michael J. Flynn, County Clerk of the County of Cook, Do Hereby Certify that I am
1307 the lawful custodian of the official records of Notaries Public of said County, and as such officer am duly authorized to issue certificates of magistracy, that Helen Hill, whose name is subscribed to the annexed Jurat, was at the time of signing the same, a Notary Public in Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths and to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in said State of Illinois, all of which ap-
1308 pears from the records and files in my office; that I am well acquainted with the handwriting of said Notary, and verily believe that the signature to the said Jurat is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my office in the City of Chicago, in the said County, this 10th day of August, 1936.

(Seal) MICHAEL J. FLYNN,
County Clerk.

EXHIBIT A.

Non-Cancellable Income Policy

This policy provides indemnity for loss of time through accidental means, and for loss of time by sickness; to the extent herein provided.

Founded 1868

[Crest]

The Pacific Mutual Life
Insurance Company of California
(Herein Called Company)

Hereby Insures *** Wilber G. Katz *** (herein called Insured and described in the Application), subject to all provisions and limitations herein contained:

Against disability commencing while this policy is in force and resulting from bodily injury effected through accidental means; and against disability commencing while this policy is in force and resulting from sickness; as follows:

Total Loss of Time

Part A. (1) The Company will pay indemnity at the rate of *** Two Hundred *** Dollars per month for the period throughout which disability described above consists of continuous, necessary and total loss of all business time, but no indemnity shall be paid under this Part A, or under Parts C, D or E for the first *

Three Months of any period of such total loss of all business time, provided, however, that indemnity will be paid for the entire period of such total loss of all business time immediately succeeding a period of partial disability for the entire period of which benefits are payable under the provisions of paragraph (2) of this Part A.

Partial Loss of Time

(2) The Company will pay indemnity at the rate of one-half of the amount per month specified in paragraph (1) of this Part A, for any period or periods throughout which disability described above does not consist of total loss of all business time, but consists of continuous inability to prosecute important daily business duties, provided that in each instance the period of such partial disability immediately succeeds a period of total loss of all business time for which indemnity is payable under the provisions of paragraph (1) of this Part A, and provided further that indemnity for such period or periods of partial disability will not be paid for more than a total of six months during any continuous disability.

Hospital Indemnity

Part B. Should the Insured, by reason of bodily injury or sickness covered by this policy, be under treatment and also be resident in a licensed hospital, the Company will pay, in ad-

1315 dition to whatever other indemnity may be payable under this policy, monthly indemnity at the rate of .25% of the amount specified in paragraph (1) of Part A, for the continuous period of such residence and treatment, commencing at the first day thereof and not exceeding three months, throughout which the Insured suffers a continuous, necessary and total loss of all business time, but such indemnity will not be paid for more than one period as the result of any one 1316 accident or disease or for more than one period during any continuous disability.

Loss of Both Hands, Both Feet, Hand and Foot or the Sight of Both Eyes

Part C. Should the Insured suffer, as a direct result of such injury or such sickness, the loss of both entire hands by complete severance at or above the wrists, or the loss of both entire feet by complete severance at or above the ankles, or 1317 the loss of one entire hand by complete severance at or above the wrist and one entire foot by complete severance at or above the ankle, or the irrecoverable loss of the entire sight of both eyes, he shall be deemed to have sustained a permanent disability resulting in continuous, necessary and total loss of all business time and the Company will pay indemnity at the rate per month specified in paragraph (1) of Part A as long as he shall live, or;

1318 Loss of One Hand or One Foot

Part D. Should the Insured suffer, as a direct result of such injury or such sickness, the loss of one entire hand by complete severance at or above the wrist, or the loss of one entire foot by complete severance at or above the ankle, the Company will pay indemnity at the rate per month specified in paragraph (1) of Part A for the period during which such loss causes disability resulting in continuous, necessary and
1319 total loss of all business time, and at the termination of such disability will consider such loss to have caused a permanent disability of 25%, and will pay the Insured, as long as he shall live, monthly indemnity at the rate of 25% of the amount specified in paragraph (1) of Part A, or;

Loss of the Sight of One Eye

Part E. Should the Insured suffer, as a direct result of such injury or such sickness, the
1320 irrecoverable loss of the entire sight of one eye, the Company will pay indemnity at the rate per month specified in paragraph (1) of Part A for the period during which such loss causes disability resulting in continuous, necessary and total loss of all business time, and at the termination of such disability will consider such loss to have caused a permanent disability of 10%, and will pay the Insured, as long as he shall live,

1321 monthly indemnity at the rate of 10% of the amount specified in paragraph (1) of Part A.

*No indemnity except Hospital Indemnity is payable under this policy for the specified first part of any period of disability.

Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modi-
1322 fied by the Company's classification of risks and premium rates in the event that the Insured is injured or contracts sickness after having changed his occupation to one classified by the Company, as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the in-
1323 demnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

If the law of the state in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks men-

1324 tioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Company is liable.

2. No statement made by the applicant for insurance not included herein shall avoid the 1325 policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate 1326 the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness.

1327 5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at its Home Office, 501 West Sixth Street, in the City of Los Angeles, California or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably pos-
1328 sible to give such notice and that notice was given as soon as was reasonably possible.

6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the
1329 policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Company at its said office within ninety days after the termination of the period of disability for which the Company is liable.

8. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably

1330 require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the continuance of the period for which the Company is liable, and any balance remain-
1331 ing unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. All the indemnities of this policy are payable to the Insured.

12. If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured and surrender of the policy, will cancel the
1332 same and will return to the Insured the unearned premium.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

1333 15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

17. If the Insured shall carry with another company, corporation, association or society other insurance covering the same loss without giving
1334 written notice to the Company, then in that case the Company shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premium paid as shall exceed the pro rata for the indemnity thus determined.

18. Upon the payment of claim hereunder any premium then due and unpaid or covered
1335 by any note or written order may be deducted therefrom.

19. If a like policy or policies previously issued by the Company to the Insured be in force concurrently herewith, making the aggregate indemnity for loss of time on account of disability in excess of $250.00 weekly, the excess insurance shall be void and all premiums paid for such excess shall be returned to the Insured.

1336 20. The insurance under this policy shall not cover any person under the age of eighteen years nor over the age of sixty years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

Additional Provisions

21. This insurance does not cover, (1) any disability for which the Insured is not necessarily and regularly attended by a legally qualified physician other than the Insured; provided, however,
1337 that this requirement shall be waived in the event such attendance is declared by medical authority satisfactory to the Company to be unnecessary; (2) any attempt at suicide, sane or insane; (3) disability resulting wholly or partly, directly or indirectly from (a) bodily injury sustained or sickness contracted while the Insured is engaged in military or naval service in time of war, (b) bodily injury or sickness caused by war or by
1338 any act of war, (c) bodily injury, fatal or non-fatal, sustained, or sickness contracted by the Insured while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith, or while operating or handling any such vehicle or device, (d) bodily injury sustained or sickness contracted except while the Insured is within Canada or Europe or the United States (not including Alaska, Panama Canal Zone or the insular possessions of the United States), or while traveling between them

by regular lines of passenger conveyance (not including aerial conveyance).

22. The allowance of indemnity under the provisions of either of paragraphs C, D or E shall proportionately reduce the monthly indemnity payable for all other loss or disability thereafter occurring.

23. After the first twelve months of disability, no indemnity shall be payable for any period of disability during which the Insured is not continuously within the United States (not including Alaska, the Panama Canal Zone or the insular possessions of the United States) unless a written permit to reside elsewhere be granted by the Company.

24. All premiums on this policy are due and payable in advance at the Home Office of the Company, but may be paid to any authorized agent or manager of the Company producing receipts signed by the President, a Vice President, the Secretary or an Assistant Secretary, and countersigned by such authorized agent or manager. A grace of thirty-one days shall be granted for the payment of every premium after the first, during which time the insurance hereunder shall continue in force. After any default in payment of premium this policy may be reinstated as provided in Standard Provision Number 3 at any time within six months from the date of such default on written application

1342 by the Insured to the Home Office of the Company and the payment of the defaulted premium, provided the Insured shall with such application submit evidence of insurability satisfactory to the Company.

25. Indemnity for disability will not be paid under this policy at a rate in excess of the average earnings of the Insured for the period of time that he has been actually employed during the two years immediately preceding the com-
1343 mencement of the disability for which the Company is liable, and all premiums paid during said two years for that portion of the disability indemnity in excess of the amount of such earnings will be returned upon request of the Insured. The Insured shall have the right to reduce any or all of the indemnities of this policy and upon his request and temporary surrender of the policy for endorsement, the Company will endorse it, making such reduction of indemnities
1344 and a proportionate reduction in premium.

26. At any time during the life of this policy, if the Insured changes his occupation to one different from that stated in this policy, the Company hereby agrees upon the surrender of this policy to issue in lieu thereof upon the written request of the Insured, a new policy containing the same provisions as this policy except a change in the amount of the benefits payable, the new policy to provide such an amount payable

1345 for disability as the premium paid for this policy will purchase at the rates but within the limits fixed by the Company for such different occupation.

If the age of the Insured has been mis-stated, any amount payable under this policy shall be that amount which the premium paid would have purchased at the rate fixed by the Company for the Insured's correct age; except, that if the true age of the Insured at the time of application for 1346 this policy is over fifty-five, the policy shall be null and void and the Company shall return all premiums received less any indemnity paid prior to the ascertainment of the correct age.

27. The Insured is by occupation a Attorney – Office, Court and Traveling classified Preferred by the Company.

Any assignment of this policy must be in writing. The Company shall not be deemed to have 1347 notice of any assignment unless nor until acknowledgment of said notice shall have been endorsed on the policy and signed by an executive officer of the Company. The Company shall not assume responsibility for the validity of any assignment.

28. The annual premium for this policy is * * * Forty Eight and 00/100 * * * Dollars and the policy expires one year from its date. The Insured shall have the right at the time of such expiration to renew this policy for a term of

33 years by the payment of a like premium on the 14th day of September in each succeeding year, provided, however, that this policy shall not be renewed beyond its anniversary date nearest the sixtieth birthday of the Insured. Insurance under this policy is effective in consideration of the payment in advance of the premiums herein provided for and in further consideration of the statements made in the application for this policy, copy of which application is attached hereto and is hereby made a part of this policy. The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made with intent to deceive shall bar all right to recovery under this policy. No provision of the charter, constitution or by-laws of the Company not herein set forth shall be used in defense of any claim arising under this policy. Failure to comply with any of the provisions of this policy shall render invalid any claim under this policy.

In Witness Whereof, the Company has, by its proper officers, signed this Contract in the City of Los Angeles and caused same to be countersigned by its authorized Agent or Manager, as of the 14th day of September, 1928 twelve

1351 o'clock noon, Standard Time at the place of the Insured's residence.

S F McClung
Secretary

George I. Cochran
President

Countersigned

W. B. Snowden
Authorized ~~Agent or~~ Manager

[In margin]: Change of Premium Due Date
See Endorsement

1352 Los Angeles, California, September 14, 1931

On request of Wilber G. Katz, the Insured under Non-Cancellable Income Policy No. 5515757, it is hereby agreed and understood that the premium on said policy shall hereafter be payable as follows:

The sum of Twelve and no/100 dollars shall be paid on September 14, 1931 in lieu of the payment of annual premium. Said sum shall pur-
1353 chase insurance up to and including December 14, 1931. The annual premium of Forty-eight and no/100 dollars shall be paid on December 14, 1931 and a like annual premium shall be paid on December 14th in each succeeding year during the continuance of the policy.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

G. N. Martin
Assistant Secretary

Carry Groton
Junior Vice President

1354 No. 551757

[Crest]

The Pacific Mutual Life Insurance Company of California

Non-Cancellable

Income Policy

Form A 383

Renewable to Age Sixty

Issued To

1355 * * * Wilber G. Katz * * *

This policy provides indemnity for loss of time through accidental means, and for loss of time by sickness; to the extent herein provided.

No indemnity except Hospital Indemnity is payable under this policy for the first part specified herein of any period of disability.

Please Read Your Policy

Kindly use Black ink as this blank is to be

1356 photographed

Application for Insurance—Accident Department

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

I hereby apply for Non-Cancellable Income Insurance, to be based on the following representations and on the representations that I shall make in answer to the questions to be asked by the Company's Medical Examiner in continuation of this application.

1357 1. What is your full name? (Please print)
Wilber G. Katz

2. Where do you reside?
No. 149 Willow St Street
Town Brooklyn State NY.

3. Where and when, were you born, and what is your age? Town Milwaukee State or Country Wis. Month June Day 7 Year 1902 Age at Nearest Birthday 26 Years

4. What are your occupations? (Describe
1358 fully) Lawyer

5. What are the duties required of you? (Describe fully) Legal

6. What is the name of your employer?
Root, Clark, Buchner, Howland Ballantine

7a. How long in present occupation? two Years

b. What was former occupation? student.

8. What is the location of your employer's place of business?
1359 No. 31 Nassau Street
Town NY. State NY.

9. Whom do you designate as beneficiary under policy applied for, and what relationship is such beneficiary to you? (Please Print) If for Disability Benefits only, write "None"
None Relationship

10. Does the disability indemnity applied for in this and other companies or associations together with that under other insurance now held,

1360 by you exceed your average monthly earnings? No

11. Are your personal habits correct and temperate? Yes

12. Have you any Life, Permanent Total Disability, Accident or Sickness Insurance in this or any other company or association? (If in this Company, give policy numbers, State whether Accident and Sickness Indemnity is
1361 weekly or monthly.)

	Life Insurance		P. T.D.
Company	Amount	Year Issued	Amount
Mutual L.	5 000	1926	503
Mass.	10,000	1927	100
Mass	10,000	1928	None

Accident and Sickness Insurance

1362 Company	Prin. Sum	Acc. Ind.	Sick Ind.
None			

13. Have you ever made application for life, accident or sickness insurance upon which you have not been notified of the action taken, or has any application ever made by you for life, accident or sickness insurance been declined or

1363 postponed, or has any policy of accident or sickness insurance issued to you been cancelled or renewal refused by this or any other company or association? (Give particulars) No.

14. Have you ever received or been refused compensation for accidental injuries or sickness, or have you any claim now pending? (Give particulars) No

15. Have you ever had or have you now any
1364 bodily or mental infirmity or deformity (including hernia and rupture), or have you impaired hearing, any disease of either eye, lost a limb or the sight of an eye, or are you in any respect maimed or in unsound condition mentally or physically? (Give particulars) No

16. Have you in contemplation—any hazardous undertaking—any special journey—or any
1365 traveling outside the United States? (Give particulars). No

17. Do you agree that the falsity of any answer in this application for insurance or any answer made to the Company's Medical Examiner in continuance of this application for insurance shall bar the right to recover thereunder if such answer is made with intent to deceive or materially affects either the acceptance of the

1366 risk or the hazard assumed by the Company? Yes

18. Do you agree that the Company may make in the space provided "For Home Office Endorsements Only" such correction in or addition to this application as may be required, subject, however, to your ratification, which shall be conclusively presumed by your acceptance of any policy issued thereon? Yes

1367 For Home Office Endorsements Only

19. Do you agree that if entire amount of annual premium for the insurance applied for is not paid at time of making this application, there shall be no liability on the part of the Company under this application unless nor until a policy is
1368 issued and delivered to you and entire amount of such annual premium actually paid during your lifetime and while you are in good health and free from injury, and do you further agree that if entire amount of such annual premium is paid to the Company's agent at time of making this application, insurance (subject to the provisions of the Company's regular policy of the form applied for) shall be effective from date of medical

1369 examination for said insurance, provided the Company in its judgment shall be satisfied as to your insurability under form of policy applied for, on date of such examination, and do you further agree that if the Company shall not be so satisfied, entire amount of premium paid, without interest, shall be returned?

WILBER G. KATZ
Applicant's own signature in full

1370 Dated at N. Y. NY this 7th day of Sept 1928

Signed in the presence of STEPHEN G PRATT
Soliciting Agent

Statement to Be Signed by Applicant for Settlement With Agent

No. 528260 I Hereby Declare that I have paid to Stephen G Pratt Agent of The Pacific Mutual Life Insurance Company of California Forty eight no/100 Dollars, and that I hold his
1371 receipt for same, written on receipt form detached from, and corresponding in date and number with this application.

WILBER G. KATZ
Applicant's own signature in full

Date Sept. 6, 1928

Endorsed: Filed Aug. 12, 1936, 4:04 p. m. L. E. Lampton, county clerk: by J. MacGregor, deputy.

1372 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner v. The Pacific Mutual Life Insurance Company of California, respondent.

Pacific Mutual Life Insurance Company, intervenor. No. 404673.

Answer to Order to Show Cause of Defend-
1373 **ants Rowe Sanderson, Henry B. Safford, Harold Bayly, Robert S. Breyer and Laurens Max Chapman, Non Cancellable Policy Holders.**

Come now the defendants Rowe Sanderson, Henry B. Safford, Harold Bayly, Robert S. Breyer and Laurens Max Chapman and answer the order to show cause issued under date of July 2, 1936, in the above entitled matter, as follows:

1374 I.

That said Rowe Sanderson is the owner and holder of a non-cancellable income policy issued by The Pacific Mutual Life Insurance Company of California, which policy is more particularly designated as Policy #4612349, Form A-284, dated March 1, 1921, and provides for disability benefits of $750.00 per month, and for the payment of a premium of $150.00 per annum. All premiums which have become due and payable

upon said policy have been paid and said policy is now in full force and effect.

II.

That said Henry B. Safford is the owner and holder of a non-cancellable income policy issued by The Pacific Mutual Life Insurance Company of California, which policy is more particularly designated as Policy #4622227, Form A-284, dated September 10, 1921, and provides for disability benefits of $500.00 per month and the payment of a premium of $100.00 per annum. All premiums which have become due and payable upon said policy have been paid and said policy is now in full force and effect.

III.

That said Harold Bayly is the owner and holder of a non-cancellable income policy issued by The Pacific Mutual Life Insurance Company of California, which policy is more particularly designated as Policy #4623750, Form A-283, dated September 19, 1922, and provides for disability benefits of $400.00 per month and for the payment of a premium of $110.00 per annum. All premiums which have become due and payable upon said policy have been paid and said policy is now in full force and effect.

IV.

That said Robert S. Breyer is the owner and holder of a non-cancellable income policy issued by The Pacific Mutual Life Insurance Company

of California which policy is in full force and effect; but information as to the details of said policy is not now available and when said information is available it is proposed to amend this answer.

V.

That said Laurens Max Chapman is the owner and holder of a non-cancellable income policy issued by The Pacific Mutual Life Insurance Company of California, which policy is more particularly designated as Policy #4651066, Form A-292, dated August 26, 1924, and provides for disability benefits of $250.00 per month for the payment of premium of $66.25 per annum. All premiums which have become due and payable upon said policy have been paid and said policy is now in full force and effect.

VI.

Said defendants oppose the confirmation, approval and ratification of the permission heretofore given by said court with respect to that certain plan and agreement of rehabilitation, sale and transfer of assets and reinsurance of The Pacific Mutual Life Insurance Company of California, more particularly referred to in said order, and likewise oppose the confirmation and approval of the action of the said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, as liquidator of said In-

1381 surance Company, as well as the action of said Pacific Mutual Life Insurance Company in making, executing and carrying out that certain agreement referred to in said order to show cause.

Said defendants likewise oppose the confirmation and approval of the execution and delivery of the deed and bill of sale attached to the petition filed herein as "Exhibit C" and the action of said Commissioner in transferring and setting
1382 over to the Pacific Mutual Life Insurance Company of the assets of The Pacific Mutual Life Insurance Company of California. And likewise oppose the approval of the terms and conditions upon which it is proposed to issue in exchange securities pursuant to the plan and agreement hereinbefore referred to.

VII.

In support of their opposition, the said defendants allege:

1388 (a) That said defendants have not sufficient information with respect to either the financial condition of the old company or with respect to the facts or the reason upon which the proposed plan of reorganization is based to enable them, or either of them, to determine the necessity of or justification for the proposed plan.

(b) That the plan of reinsurance of the noncancellable policies, including those of these defendants, as set forth in said Rehabilitation and

1384 Reinsurance Agreement, hereinbefore referred to, constitutes an unlawful and unfair discrimination against the holders of non-cancellable policies in favor of holders of other types of policies and said plan of reinsurance of the said non-cancellable policies is in violation of the rights of said policyholders under the terms of the contract of insurance and impairs the obligations thereof.

(c) The transfer of the assets of the old
1385 company to the new company is without any sufficient or adequate consideration therefor and by virtue thereof, the holders of non-cancellable policies are deprived of substantial property rights and the benefits of the policies held by them are substantially damaged if not entirely destroyed.

(d) Paragraph I of the Rehabilitation and Reinsurance Agreement is indefinite and uncertain in that it is provided that the Insurance
1386 Commissioner reserves certain assets of the old company from transfer to the new company without any provision for the disposition thereof.

(e) The provisions of paragraph XVIII of said agreement are unfair and unjust in that policyholders are bound thereby and deprived of substantial rights without their consent.

(f) Defendants are informed and believe, and upon such information and belief allege, that the facts and circumstances which have prompted the proceedings in this matter by the parties

1387 thereto are not fully disclosed therein and that defendants are entitled to a full disclosure thereof to enable them to more properly present their defense.

(g) That the order of the court heretofore made approving the proposed plan and confirming the transfer of the assets of the old corporation to the new corporation was made without notice to or opportunity of defendants, or either of them, to appear and defend their rights as
1388 the holders of non-cancellable policies and as a result of said order and said plan and transfer of assets and of the agreement entered into by and between the Insurance Commissioner and the respective companies, the said defendants and each of them have been deprived of their property without due process of law in violation of the provisions of Section 13 of Article I of the Constitution of the State of California, and in violation of Article V, and of Section 1 of Arti-
1389 cle XIV of the Constitution of the United States. That no process has ever been served upon said defendants, or either of them.

VIII.

This answer is not intended to constitute an election on the part of the defendants, or either of them, either to join in any plan which may be finally adopted, or to file a claim, and said answer is filed without prejudice to any rights of the defendants, or either of them, with respect thereto.

1390 Wherefore, said defendants pray that the order of the court heretofore made approving said plan and confirming the transfer of the assets, as herein alleged, be set aside and that the petitioners herein and all of the parties to said plan and agreement be compelled to make a full and complete disclosure of all of the facts and circumstances pertaining to the affairs of the old company and that thereafter said court make such order as may be proper to protect the rights
1391 of all parties concerned, including the rights of these defendants as holders of non-cancellable policies, and for such other order as may be proper.

HOWARD ROBERTSON,
(HOWARD ROBERTSON)
CHAPMAN AND CHAPMAN,
By L. M. CHAPMAN,
Attorneys for Said Defendants.

Verified.

1392 Endorsed: Received copy of the within answer, etc., this 12th day of August, 1936. U. S. Webb, attorney general, by John L. Flynn, deputy, attorney.... for petitioner.

Received copy of the within answer, etc., this 12th day of August, 1936. O'Melveny, Tuller & Myers, by Homer I. Mitchell, attorney.... for Pacific Mutual Life Ins. Co.

Filed Aug. 12, 1936, 2:38 p. m. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1393 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404673.

Application for Order to Liquidate.

Comes now Samuel L. Carpenter, Jr., Insur-
1394 ance Commissioner of the State of California, and respectfully shows:

1. That petitioner is, and at all times subsequent to April 4, 1935, has been, the duly appointed, qualified and acting Insurance Commissioner of the State of California; that on the 22nd day of July, 1936, pursuant to application for order appointing conservator, the above entitled court did in this proceeding, by order duly given and made under and pursuant to Section
1395 1011 of the Insurance Code of the State of California, appoint petitioner herein as conservator of respondent corporation. That on August 11, 1936, the above entitled court by order duly given and made herein, did ratify, approve and confirm the aforesaid order and appointment, did adopt the same and continue the same in force, and did expressly reappoint your petitioner as conservator as aforesaid. That under and in accordance with the terms of said orders, pe-

1396 titioner has taken possession, title and charge of the business, affairs and assets of respondent corporation wherever situated.

2. That respondent corporation is insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of the Insurance Code of the State of California, as more fully appears from the last report of examination of respondent made by petitioner, which said last report is attached to petitioner's "Application for Order
1397 Appointing Conservator" on file herein; that it appears to your petitioner that further efforts to proceed under Section 1011 of the Insurance Code of the State of California as conservator would be futile. That the respondent corporation has heretofore and over a period of many years issued its non-cancellable accident and health policies; that the reserves which respondent corporation has set up upon such policies are grossly inadequate; that the premium rate
1398 thereon was and now is entirely inadequate to maintain reserves necessary to mature said policy obligations. That said last report of examination shows that as of December 31, 1935 a deficiency in reserves in the Accident Department of the respondent corporation existed in the amount of twenty-three million, twenty-five thousand, four hundred seventy and 70/100 dollars ($23,025,470.70); that during the calendar year 1935 the gross premiums received on said non-cancellable policies was less than the gross

1399 amount of claims paid thereon. That said condition has continued and grown worse during the year 1936. That in the opinion of your petitioner said conditions must continue so long as respondent corporation continues to operate its business with the result that deficiencies in its reserves will grow worse. That the earnings from the other departments of respondent corporation have not been, and if respondent corporation were permitted to continue the opera-
1400 tion of its business as heretofore, would not be sufficient to make up the deficits attributable to the Accident Department as aforesaid. That the surplus from the other departments of respondent corporation as of December 31, 1935 as disclosed by said report were and are insufficient to restore the impaired reserves of the Accident Department; and the said last report of examination shows that the deficiencies in reserves for all branches of the business of re-
1401 spondent corporation as of December 31, 1935 was seventeen million five hundred sixty-four thousand, three hundred seventy-four and 70/100 ($17,564,374.70).

3. That your petitioner proposes to use his best efforts to conserve the value of the assets of the respondent corporation taken over in liquidation in order that the greatest amount may be obtained and the best protection afforded for the policyholders, claimants and others interested, and to that end to maintain, so far as

1402 possible, the preservation of the goodwill and going concern value of the business, represented in large part by its name, its efficient agency organization and other intangible assets of like nature, all of which, if allowed to lapse into inactivity as a result of these proceedings, would fast deteriorate in value and usefulness, resulting in irreparable damage to the policyholders, creditors, stockholders and public in general; that in order to prevent irreparable injury and
1403 damage to the agency organization and goodwill value of respondent corporation and to preserve and conserve its assets for the benefit of its policyholders, creditors, stockholders and the public in general, it is imperative that the assets of respondent corporation be used immediately and continuously in the working out, formulation and preparation of a rehabilitation and/or reinsurance agreement which in the judgment of petitioner will most fairly and equitably preserve
1404 the value of the assets and protect the rights, interests, liabilities and claims of all persons concerned herein, including the policyholders, creditors, stockholders and the public in general, and which shall provide for the removal of the causes and conditions which have made this proceeding necessary; that petitioner, as conservator, has heretofore been directed by this court to formulate, work out and prepare a rehabilitation and/or reinsurance agreement. Petitioner

1405 has used and proposes to continue to use his best efforts to effectuate such an agreement.

4. That your petitioner did on July 22, 1936, file with this court and in this proceeding an application for an order to liquidate and wind up the business of said respondent. After said petition was filed and on July 22, 1936, this court, by an order signed by the Honorable Douglas L. Edmonds, one of the judges thereof, did appoint your petitioner as liquidator of the assets
1406 and business of said respondent, and did direct your petitioner, as such liquidator, to wind up and liquidate the business of said respondent, and made further orders in connection therewith, as shown by said order on file in this proceeding.

5. Your petitioner and his counsel have been advised by the Honorable Douglas L. Edmonds, judge of the above entitled court, that he is the holder of a life policy in the sum of $5,000 issued by respondent corporation; that he has not
1407 heretofore and that he does not now consider that said fact disqualifies him in connection with this proceeding; that, nevertheless, it has occurred to him that it may hereafter be asserted that by reason of his ownership of such policy he was and is disqualified herein; that over 275,000 persons hold policies of insurance issued by said respondent, and that by reason of the vast number of persons whose rights are involved and the widespread business interests of the respondent, the successful winding up and

liquidation of the business and affairs of said respondent is of great public and private importance; that it is essential to the successful liquidation and winding up of the business and affairs of said respondent that the validity and legality of your petitioner's position as liquidator and of his acts as liquidator be clear and certain, otherwise the success of his efforts as liquidator may be seriously impaired. It, therefore, appears desirable that petitioner re-apply to this court for an order to liquidate and wind up the business of respondent corporation, and that this court upon a full hearing consider this re-application.

6. That heretofore and in said orders appointing petitioner as conservator, this court made its order enjoining and restraining said respondent corporation, its officers, directors, agents, servants and employees, from the transaction of any of the business of said corporation or from the disposition of any of its property or assets until the further order of this court; and said persons, all creditors of said respondent corporation and claimants against said respondent corporation, and all other persons, from interfering in the transaction, conservation, management, operation or disposal of any of the assets of or the business of respondent corporation, or from instituting or prosecuting any action, suit or proceeding, or from levying any attachment or execution or other process, or sell-

1411 ing under or prosecuting any attachment or execution or other process against any property or assets of said respondent corporation, wheresoever situated, without the consent of this court obtained after reasonable notice to petitioner, and it is necessary and desirable that said order so enjoining and restraining said persons may continue in full force and effect in favor of petitioner as liquidator herein.

7. That there are pending various claims of
1412 alleged creditors and obligees of respondent; that it is necessary and proper that all creditors and obligees of respondent and all persons having claims against said respondent be given reasonable opportunity to present and file their claims with petitioner after he has been appointed liquidator of the business and affairs of respondent; and that petitioner, after his said appointment, have reasonable opportunity to examine into and pass upon the merits of said claims.

1413 Wherefore, petitioner prays for an order of this court:

1. Ratifying, approving and confirming the "Order of Liquidation" made herein by the Honorable Douglas L. Edmonds under date of July 22, 1936, and adopting the same and continuing it in force.

2. Fixing July 22, 1936, at the hour of 1:00 p. m., Pacific Standard Time, as the date and time as of which the rights and liabilities of re-

1414 spondent corporation and of creditors, policyholders, shareholders and members, and all other persons interested in the assets of said respondent corporation shall be fixed.

3. Appointing Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as liquidator of all of the assets and business of The Pacific Mutual Life Insurance Company of California.

1415 4. Confirming all of the right, title and interest heretofore owned by respondent corporation in and to its assets and property, real and personal, wheresoever situated, and heretofore vested in petitioner as conservator, in petitioner or his successor in office as liquidator of The Pacific Mutual Life Insurance Company of California.

1416 5. Directing petitioner to conduct, manage and operate the business of respondent corporation pending the final adoption and final approval of a plan of rehabilitation and reinsurance or until further order of this court.

6. Directing petitioner, as liquidator, to wind up and liquidate the business of respondent corporation.

7. Directing petitioner, as liquidator, forthwith if possible, to formulate, prepare and sub-

1417 mit, for the approval of the court, a plan and agreement of rehabilitation and reinsurance which, in the judgment of petitioner, will best preserve the value of the estate in liquidation and provide for the removal of the causes and conditions which have made this proceeding necessary, and most fairly and equitably protect and provide for the rights, interest, liabilities and claims of all persons concerned herein, and di-
1418 recting petitioner to pay from or make provision for the payment from the assets of respondent corporation of all expenses necessarily incurred in connection therewith;

8. Continuing in full force and effect for the benefit of petitioner, as liquidator, all of the injunctions and restraints aforesaid upon any and all persons by said order of this court appointing petitioner as conservator of the business and
1419 assets of respondent corporation.

9. Directing petitioner at an appropriate time to publish notice to the policyholders, creditors, shareholders and all other persons interested in the assets of respondent corporation to file their claims with him as liquidator in his offices located at the Pacific Mutual Building, Los Angeles, California, or at 417 Montgomery street, San Francisco, California, with proper

proofs thereof, within six months after the date of first publication of such notice; and

10. Ordering and adjudicating that neither this application nor any order nor order to show cause made or issued hereon shall constitute any revocation or abrogation of any orders heretofore made in this proceeding or any adjudication or ruling with respect to the effect of the ownership of said policy upon the right of the Honorable Douglas L. Edmonds to sit or act or make any of the orders heretofore made by him herein; and

11. For such other and further relief as this court may deem meet and proper.

Dated: August 13th, 1936.

SAMUEL L. CARPENTER, JR.,
SAMUEL L. CARPENTER, JR.,
Insurance Commissioner of the State of California.

U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorneys for Petitioner.

Verified.

Endorsed: Filed Aug. 13, 1936. L. E. Lampton, county clerk; by A. G. Stanham, D. 11, deputy.

1423 [TITLE OF COURT AND CAUSE.]

Complaint in Intervention.

Application for Order to Liquidate.

Now comes J. Parker Evans, by and through Frank N. Julian, as Superintendent of Insurance of Alabama, on behalf of himself and all other holders of Active-Life Non-Cancellable Income Policies (hereinafter called Non-Can Policies) issued in the State of Alabama by Pacific Mu-
1424 tual Life Insurance Company, who may wish to join with him in the proceeding, and makes answer to the rule and order to show cause directed to all holders of such policies and issued out of this court pursuant to an order entered herein on, towit the 23rd day of July, 1936, and for such answer shows unto the court as follows:

1. The rehabilitation, sale and transfer of
1425 assets and reinsurance plan and agreement concerning Pacific Mutual Life Insurance Company of California proposed by Samuel L. Carpenter, Jr., Insurance Commissioner of California, dated July 22, 1936, as amended (hereinafter called Plan and Contract) ought not to be confirmed unless and until the holders of such Non-Cancellable Income Policy Contracts have been protected in the particulars hereinafter mentioned.

In general, Non-Can policyholders of whom there are fifty thousand, are obliged to elect

1426 within sixty (60) days whether they will accept reinsurance or, declining reinsurance, prove their claims as creditors. All other policyholders receive approximately the full benefits provided by their policies. Non-Can policyholders alone (with exceptions that are here immaterial) are the creditors. As such creditors, they must make the aforesaid election without knowing or being able to ascertain what are their rights, or what the consequences of their election may be. They
1427 do not know (and no one can tell them) whether, if declining reinsurance and they prove claims, their claims would be allowed to the extent of their ratable participation in the unearned premium reserve amounting to approximately $2,900,000.00, or in the reserves set up by the old company in respect to all Non-Can Active-Life policies amounting to approximately $6,000,000.00, or in the full amount of reserve set up by the Convention Examination amounting to
1428 approximately $24,000,000.00. In total darkness they must choose between this undefined alternative and the opposite alternative of accepting reinsurance, which in its present form is either undefined or fails in its definition to give them rights to which they are entitled.

The whole Plan and Contract is based upon the theory that Non-Can policies were the cause of the company's downfall, and, consequently, must be excluded or greatly reduced from participation in assets, and throughout the Plan is

implicit a penalizing of Non-Can policyholders. There is no stewardship set up in the Plan for the preservation of Non-Can policy rights.

More particularly:

A. All Active-Life Non-Can policyholders are permitted under paragraph 9 of the Contract to reinstate their policies that have lapsed in the manner provided in said policies, and in addition are granted the right under paragraph 4 of the Contract to reinstate such policies within 60 days after the effective date of the Agreement, subject to the reduction in benefits provided by the Contract; but if in the meanwhile a Non-Can policyholder has become disabled so as to be "eligible for benefits under the policy," he is denied this right. This is inequitable. The contract was breached through no fault of his; he has been thrown into a panic through the widely publicized fact of the company's insolvency. He does not know and could not ascertain from anywhere what his rights and liabilities are. If, under these circumstances, he has failed to pay his premium or prudently waited to ascertain his rights, he should, after learning his rights, be able to reinstate his policy on the same terms as the policyholder who has not become disabled.

B. Paragraph 8 of the Plan and Contract sets apart future earnings for the restoration of benefits to Non-Can policyholders; but this paragraph does not fix the time as of which the

1432 restoration shall be made. It provides that the "Extent" as well as the "Manner of the application of sums equivalent to such net profits to the restoration of benefits" are both matters of future determination. The time when the restoration will be made and the manner of its application must necessarily be matters of discretion, but the time as of which is a fact necessary to be known by any Non-Can policyholder
1433 who is put to an election of accepting or rejecting reinsurance.

Active-Life Non-Can policyholders who become disabled and receive reduced benefits before any restoration should receive with their settlements certificates evidencing their right to their distributive share of future restorations.

With reference to Non-Can policyholders who shall lapse: Their policies having been breached
1434 by insolvency, why should their right to participate in restorations and in the present reserves be terminated by their lapse? Stockholders' rights, which are junior to them, do not at any time lapse. Active-Life Non-Can policyholders in the aggregate now own at least $6,000,000 of reserves included in the $214,000,000 of assets being administered. Should they not have at least this much cash value after the moratorium?

1435 If it be said that accepting reinsurance alters this right, then should the agreement not clearly provide that any of this $6,000,000 reserve released by lapse of Active-Life Non-Can policies should go to the restoration fund of those who who do not lapse? We are told today that this last provision is implied; although sub-division (d) of paragraph 15 apparently carries any such released reserves to the Company's surplus and
1436 to the general benefit of all policyholders.

C. Paragraph 12, subdivision (d) of the Plan and Contract obligates the new company to pay, so far as available funds will pay, all claims against the old company. This does not protect the Non-Can policyholder. Available funds as therein defined are limited to the difference between the value of the old company's assets and the amount of the reserves established
1437 by the new company. This could in no event exceed in amount approximately the unearned premium reserves. The Convention Examination has determined that the present value of all Active-Life Non-Can policies is $24,685,977.00 in the same sense that the present value of all the policies of life insurance is $154,989,200.00. Against this $24,685,977 of present net worth, the old company had approximately $6,000,000.00

of reserves which were transferred intact to the new company. No provision is made by which the amount of reserves transferred to the new company so released by a Non-Can policyholder's declining reinsurance should be made available to the Commissioner for application upon the Non-Can policyholder's claim when allowed. It is unthinkable that at least this $6,000,000.00 reserve, or so much thereof as might be released by the declining of reinsurance by Non-Can policyholders should not be made applicable to the payment of their claims.

Future earnings of the new company are by paragraph 8 of the Contract charged with restoration of benefits to Non-Can policyholders reinsurance; ratable participation in such future earnings should be secured to Non-Can policyholders declining reinsurance and proving their claims. And this right of future participation should be in addition to the present cash value of their claims allowed by the court to be immediately paid by the new company under subdivision (d) of paragraph 12 of the Contract.

D. In subdivision (d) of paragraph 15 of the Contract, all reserves released by the lapse of Non-Can policies (in excess of the normal ten percent per year) are applied to the reserves

1441 or surplus of the new company, benefitting all Life policyholders as well as Non-Can policyholders. There being $6,000,000.00 of such reserves paid over intact to the new company in the transfer of assets, which $6,000,000.00 belongs under any circumstances to Non-Can policyholders, it is inequitable that any of this $6,000,000.00 released by lapse should be applied to anybody's benefit but Non-Can policyholders.

1442 E. Under paragraph 16 of the Plan and Contract, upon the mutualization of the new company, the purchase price of the capital stock held by the Commissioner is fixed at an amount sufficient to pay the outstanding claims and any excess to be repaid to the new company; unless the allowances hereinabove recommended are made to Active-Life Non-Can policyholders, including those who accept reinsurance and those

1443 who prove their claims, then they as the creditors ought to receive the full "going concern" value of the new company's business represented by the new company's stock held by the Commissioner; Active-Life Non-Can policyholders are the sole creditors. This stock is the only tangible asset held by the Commissioner for their benefit. If they do not accept reinsurance but on the contrary prove their claims, they ought to

1444 receive the utmost value of these shares until they have received the full amount of $24,685,-977 determined by the Convention Examination to be the present worth of their policies.

2. There should be a scrupulous regard, a trusteeship, protected by the most adequate sanctions, for the rights of Non-Can policyholders. This is totally absent from the Plan and Contract. The chaos in the minds of 50,000 Non-Can policyholders with respect to their rights
1445 and their utter inability to know their rights or to protect the same, calls for the greatest solicitude from this court in providing for their adequate protection.

And now, having answered the rule and order to show cause, the said J. Parker Evans, acting by and through Frank N. Julian as Superintendent of Insurance of Alabama, on behalf of himself and all other Alabama Non-Can policyholders as aforesaid, prays that this answer
1446 be taken as a cross-bill; that by appropriate process Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, in his capacity as petitioner; The Pacific Mutual Life Insurance Company of California, a corporation; Pacific Mutual Life Insurance Company, a corporation; be made parties respondent hereto, and that upon a final hearing of this cross-petition, this Honorable Court will order and direct such amendment, revision and changes in the Plan and Contract as will provide for the application

1447 to the relief of Non-Can policyholders of all assets and respective earnings as defined in said Plan and Contract equitably and ratably so that no discrimination will exist in favor of those who accept reinsurance over those who decline reinsurance. And cross-petitioner further prays that appropriate representatives of this Honorable Court, representing no other right but Non-Can policyholder rights, and amenable to the direction of the court, be appointed to represent,
1448 carry out and protect Non-Can policyholder rights until all of the benefits provided by the Plan and Contract so amended have been fully accomplished.

And if cross-petitioner is mistaken in the relief herein prayed for, then he prays for such other general, special or other relief as to this Honorable Court may seem right and proper.

And, as in duty bound, cross-petitioner will ever pray, etc.

1449 Dated: August 11, 1936.

A. A. CARMICHAEL,
Attorney General of Alabama.
FRANK E. SPAIN,
Special Assistant Attorney General of Alabama.

Verified.

[E T C] 06

Endorsed: Filed Aug. 14, 1936, 10:17 a. m. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1450 [TITLE OF COURT AND CAUSE.]

Petition With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement.

Comes now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and respectfully shows:

I.

That petitioner is, and at all times subsequent
1451 to April 4, 1935, has been the duly appointed, qualified and acting Insurance Commissioner of the State of California. That on the 22nd day of July, 1936, pursuant to application for order appointing conservator, the above entitled court did, in this proceeding, by order duly given and made under and pursuant to section 1011 of the Insurance Code of the State of California, appoint petitioner as conservator of respondent corporation; that on August 11, 1936, the above
1452 entitled court, by order duly given and made herein, did ratify, approve and confirm the aforesaid order and appointment and did adopt the same and continue the same in force and did expressly reappoint your petitioner as conservator as aforesaid. That on July 22, 1936, the above entitled court, pursuant to application of petitioner, by its order duly given and made herein, did appoint petitioner as liquidator of the assets and business of respondent corporation.

1453 That an application of your petitioner for an order ratifying, approving and adopting said order and continuing the same in force, and for reappointment of your petitioner as liquidator, is now on file herein, and an order to show cause has been issued thereon returnable on August 20, 1936. That under and in accordance with said orders and each of them, petitioner has taken possession, title and charge of the business affairs, properties and assets of respondent
1454 corporation wherever situated.

II.

Your petitioner, pursuant to the terms of said orders and each of them, has proceeded in the working out, formulation and preparation of a rehabilitation and reinsurance plan and agreement concerning respondent corporation, which, in his judgment, would preserve the value of the assets heretofore owned by respondent corporation and would fairly and equitably protect the
1455 rights, obligations and liabilities of all persons interested in the assets, business and affairs of said respondent corporation.

III.

In the formulation and preparation of said plan and agreement your petitioner has proceeded upon the theory that the same should:

(1) Preserve the value of the assets of the estate for the benefit of its creditors and policyholders;

1456 (2) Protect, as far as possible, all of the existing legal rights of all interested parties in the assets of respondent corporation now in liquidation;

(3) Afford the opportunity to policyholders to maintain, in so far as may be possible, the continuity of their insurance policies;

(4) Enable the established business created by respondent corporation to be protected and maintained as a going concern;

1457 (5) Protect the solvency of the corporation in which policies may be reinsured by avoiding the primary cause of the condition of respondent corporation, namely, the writing of non-cancellable disability and life policies on such a basis that the losses and required reserves cannot be paid or maintained.

IV.

On July 22, 1936, your petitioner proposed
1458 a plan of rehabilitation and reinsurance to respondent corporation, and on the same date filed herein his "Petition for an Order Permitting, Approving and Authorizing the Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan of The Pacific Mutual Life Insurance Company of California", wherein and whereby said plan was presented to this court and proposed for approval. Under said plan and agreement petitioner proposed the organization of a new California corporation for the purpose of con-

1459 ducting a life and disability insurance business having a capital of $1,000,000, consisting of 10,000 shares of the par value of $100 each, all of one class. Petitioner further proposed that all of the authorized stock of said corporation be purchased with assets or funds heretofore belonging to respondent corporation in the amount of $3,000,000, and the transfer to said new corporation of all of the other assets formerly, and as of July 22, 1936, held by respondent cor-
1460 poration, or by himself as liquidator thereof, except the stock of said new corporation, and any and all rights or claims of whatsoever kind said respondent corporation or petitioner in his capacity as liquidator of the respondent corporation might then have against any of the present or past officers, directors or employees, as such, of respondent corporation, or against any other person, firm or corporation by reason of wrongful or illegal acts or omissions of any of
1461 the past or present officers, directors or employees of respondent corporation, including rights or claims under any fidelity or surety bond or bonds given to or in favor of the respondent corporation to secure the faithful performance of any of its officers, directors or employees of any of their duties as such. Said plan and agreement further provided and contemplated in substance that the new corporation would assume and reinsure, to the extent and in the manner therein stated, present outstanding policies of insurance,

1462 and also provided for the assumption and payment by the new company to the extent and in the manner therein provided of all expenses of administration of its business and all claims of policyholders and others filed and finally allowed in said proceeding. Said plan and agreement also made provision to the extent and in the manner therein stated for payments to stockholders of respondent corporation.

Your petitioner considered it impracticable to
1463 formulate or attempt to carry into effect a plan of involuntary mutualization in the manner referred to in section 1045 of the Insurance Code, but your petitioner considers it desirable that the new company should operate as soon as possible on a mutual basis, and he therefore included in the above mentioned plan and agreement provisions looking to the eventual voluntary mutualization of the new company. In this connection said plan provided that as soon as legally
1464 possible the new company and petitioner as holder of its outstanding stock, should prepare and present to the policyholders of the new company, a plan for its voluntary mutualization, and that sums paid by the new company for the acquisition of the outstanding stock pursuant to such mutualization plan if accepted, and not required for the satisfaction of allowed claims against respondent corporation, are, under said plan, to be repaid by your petitioner to the new company.

1465 Thereafter, and on July 23, 1936, petitioner proposed and presented to this court for its approval, an amendment to the plan as originally proposed. The said plan as so amended was to be effectuated by the execution of an agreement between petitioner and said new company in substantially the form contained in Exhibit A attached hereto and made a part hereof.

The matter in this paragraph contained is only a brief summary of the terms of said plan,
1466 and reference is made to said Exhibit A for the complete detailed terms thereof.

V.

On July 22, 1936, this court, the Honorable Douglas L. Edmonds, Judge presiding, by its "Order Permitting, Approving and Authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of The Pacific Mutual Life Insurance Company of California," duly given and made herein did approve said plan
1467 and agreement and did declare the same to be fair and equitable to all interested parties; did authorize and order the organization of a new corporation and the use of funds and assets in connection therewith and in accordance with said plan; did authorize and order the execution of said agreement; did authorize, permit and order the transfer of assets in accordance therewith; did authorize and order the new corporation to commence and carry on an insurance business;

1468 and did generally authorize and order the doing of necessary, desirable and proper things in connection therewith. Thereafter, and on July 23, 1936, this court, the Honorable Douglas L. Edmonds, Judge presiding, did by its "Order Approving Amendment of Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement", approve petitioner's proposed amendment to said agreement.

VI.

1469 That your petitioner and his counsel have been advised by the Honorable Douglas L. Edmonds, Judge of the above entitled court, that he is the holder of a life policy in the sum of $5,000 issued by respondent corporation; that he has not heretofore and that he does not now consider that said fact disqualified him in connection with this proceeding; that, nevertheless, it has occurred to him that it may hereafter be asserted that by reason of his ownership of such policy
1470 he was and is disqualified herein; that over 275,000 persons hold policies of insurance issued by said respondent, and that by reason of the vast number of persons whose rights are involved and the widespread business interests of the respondent, the successful winding up and liquidation of the business and affairs of said respondent is of great public and private importance; that it is essential to the successful effectuation of the rehabilitation and reinsurance of the

1471 business and affairs of respondent that no doubt exist of the validity, legality or propriety of said plan and agreement or of its approval by this court. It therefore appears desirable that petitioner reapply to this court for its order in connection with said plan and agreement and secure a reapproval thereof.

VII.

That Pacific Mutual Life Insurance Company, the new company referred to in the plan afore-
1472 said (hereinafter sometimes referred to as "new company"), has been organized in accordance with said plan; that an agreement in the form referred to in said plan was executed by the new company and your petitioner on July 23, 1936; that the funds, properties and assets, which, by the terms of said plan and said agreement were to be transferred to the new corporation were, by deed and bill of sale executed by the petitioner and respondent corporation and
1473 the new company, transferred to the new company under date of July 22, 1936. That the new company has commenced to do, and is now doing, and has since July 22, 1936, been doing an insurance business. Said new company is now operating under certificates of authority issued by the insurance authorities of thirty-three or more of the states of the United States.

VIII.

Your petitioner believes that said plan and agreement of reinsurance and rehabilitation will

preserve the value of the assets formerly owned by respondent corporation, including its agency organization, goodwill and other intangible or nonstatement assets; that the same is and will be fair and equitable to the policyholders, creditors and stockholders of respondent corporation; and that the provisions for mutualization of the new company will be and are attractive to both old and prospective policyholders and will strengthen the financial condition of the new company.

IX.

In order that no question may hereafter be raised concerning the validity of the plan aforesaid, your petitioner deems it advisable that if and after an order has been entered herein ratifying, approving and adopting the order of liquidation heretofore entered herein and ordering liquidation of respondent corporation, your petitioner be authorized and directed to execute a Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement dated as of July 22, 1936, in substantially the form of that heretofore executed and attached hereto as Exhibit A; that said plan and agreement be approved and confirmed; that the transfer to the new company of the assets heretofore owned by respondent corporation be ratified, approved and confirmed; and that your petitioner be authorized and directed to execute such documents as may to him seem reasonably necessary or desirable for the purpose

1477 of confirming title to all of said assets in the new company and carrying out the intents and purposes of said plan and agreement.

X.

Your petitioner calls to the particular attention of this court the provisions of paragraph 25 of the agreement aforesaid, which paragraph provides that said agreement may be amended at any time while petitioner remains liquidator of respondent corporation, by consent of petitioner
1478 and the new company, subject to the approval of this court. It is the intention of your petitioner to use his best efforts to the end that the policyholders, creditors and stockholders of respondent corporation shall be fairly, justly and equitably treated; and if, upon full hearing on this petition it shall seem desirable that amendments be made for the purpose of clarifying any provisions of said plan or agreement or of improving the same in any particular, your petitioner and the new
1479 company will consent to such amendments and submit the same for approval at or during the hearing hereon.

XI.

Petitioner further deems it desirable that a hearing be had upon the fairness of the terms and conditions upon which it is proposed, pursuant to said plan and agreement, to issue and exchange securities in exchange for one or more outstanding securities, claims, or property inter-

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1480 ests, or partly on such exchange and partly for cash, at which hearing all persons to whom it is proposed to issue securities in such exchange shall have a right to appear.

Wherefore, your petitioner prays that an order be made herein directing the respondent corporation, its policyholders, creditors and stockholders and all other persons interested in these proceedings, at a time and place designated there-
1481 in, upon such notice as this court may prescribe, to show cause if any they have, why an order should not be made and entered herein as follows:

1. Ratifying, approving and confirming the "Order Permitting, Approving and Authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of The Pacific Mutual Life Insurance Company of California"
1482 made herein by the Honorable Douglas L. Edmonds under date of July 22, 1936, and continuing it in force.

2. Ratifying, approving and confirming the "Order Approving Amendment of Rehabilitation Sale and Transfer of Assets and Reinsurance Agreement" made herein by the Honorable Douglas L. Edmonds under date of July 23, 1936, and adopting the same and continuing it in force.

1483 3. Approving the plan and agreement of rehabilitation sale and transfer of assets and reinsurance as set forth in Exhibit A of this petition and declaring the same to be fair and equitable to all interested parties.

4. Authorizing and ordering petitioner and Pacific Mutual Life Insurance Company to execute an agreement as of July 22, 1936, in substantially the form set forth in said Exhibit A.

1484 5. Ratifying, approving and confirming the transfer to Pacific Mutual Life Insurance Company of the assets heretofore owned by respondent corporation.

6. Authorizing and directing petitioner to execute such documents as may to him seem reasonably necessary or desirable for the purpose of confirming title to all of said assets in

1485 Pacific Mutual Life Insurance Company and carrying out the intents and purposes of said plan and agreement.

7. Directing the officers, directors, agents and employees of respondent corporation to cooperate with petitioner and Pacific Mutual Life Insurance Company in the effectuation of said plan by the execution of such documents of transfer, conveyance, assurance or otherwise, and the

1486 doing of such acts in connection therewith as may be requested of them by petitioner.

8. Approving the terms and conditions upon which it is proposed, pursuant to said plan and agreement, and said amended agreement, to issue and exchange securities after a hearing upon the fairness of such terms and conditions.

9. Ordering and adjudicating that neither the application herein nor this order to show cause,
1487 nor any other order made or issued hereon, shall constitute any revocation or abrogation of any orders heretofore made in this proceeding or any adjudication or ruling as to the effect of the ownership by Honorable Douglas L. Edmonds of a life policy issued by respondent upon his right to sit or act or make any of the orders heretofore made by him herein.

1488 SAMUEL L. CARPENTER, JR.
Insurance Commissioner of the
State of California
Petitioner

U. S. WEBB, Attorney General
By JOHN L. FLYNN
Deputy Attorney General
Attorneys for Petitioner

Verified.

1489 [EXHIBIT "A".]

Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Concerning The Pacific Mutual Life Insurance Company of California

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Proposed July 22, 1936

By Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California

1490 REHABILITATION, SALE AND TRANSFER OF ASSETS AND REINSURANCE PLAN AND AGREEMENT CONCERNING THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

PRELIMINARY STATEMENT

1. History of Company and Necessity for Plan.

1491 The Pacific Mutual Life Insurance Company of California was organized under the laws of the state of California in 1867. Its principal office is located in Los Angeles, California, and since its organization it has engaged principally in the business of life insurance and also in the business of accident and health insurance, and it has been carrying on its business in more than forty of the forty-eight states of the United States and has reached a position of major importance. It is authorized to write, and for many years has written life insurance policies on

1492 a participating basis as well as life, accident and health insurance policies on a nonparticipating basis. According to its last balance sheet as of December 31, 1935 it has total admitted assets of $215,561,220.32. Its premium income for the past three years has averaged $30,393,211.95 per year. Its policyholders exceed 250,000 in number and it has issued and outstanding (including treasury shares) 508,200 shares of its capital stock held by more than 2800 persons. The total
1493 life insurance written by it and in force prior to the court proceedings hereinafter mentioned, was approximately $636,454,000.

In 1918 it commenced writing a new type of policy, viz., a noncancelable disability income policy, which proved to be attractive to the public. Due to the fact that there was little or no actuarial experience on this type of policy at that time, the premium rate established was too low and the reserves established thereon have proved
1494 to be inadequate. At the present time and for the past three years the Company has been paying, on the average, approximately $4,108,000 per year by way of disability benefits on these policies, resulting in substantial annual losses on this class of business. On the basis of past experience with this type of policy, the probable future disability claims on outstanding policies would be so substantial as to make the continuation of the Company's business on its present basis hazardous to all policyholders.

1495 As a result of the recent tri-annual Convention Examination of the affairs of the Company, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, with the approval of the Insurance Commissioners of other states who participated in the Examination, determined to take the proceedings hereinafter mentioned to preserve the assets of the Company and, so far as possible, its agency organization, good will and going business value f the benefit
1496 of its policyholders and all other persons interested therein.

2. Court Proceedings.

On July 22, 1936, the Insurance Commissioner, acting pursuant to the California Insurance Code, filed an application with the Superior Court of the State of California in and for the County of Los Angeles, alleging the Company to be in such condition that its further transaction of business would be hazardous to its policyholders,
1497 creditors and the public, and that it was insolvent, and requesting an order vesting title to all of the assets of the Company in the Commissioner in his official capacity and directing the Commissioner to take possession of all of its books, records and properties and to conduct, as conservator, the business of the Company and enjoining the Company from the transaction of its business or the disposition of its property until a further order of court. On the same day an

1498 order of court was made and entered granting the application and appointing the Commissioner conservator.

Thereafter, upon further application of the Commissioner, an order of liquidation was made, appointing him liquidator of the Company. In its order the court directed the Commissioner to formulate a plan and agreement of reinsurance and rehabilitation or sale and transfer of assets, which in the judgment of the Commissioner will
1499 best preserve the value of the estate in liquidation and provide for the removal of the causes and conditions which made the proceeding necessary and most fairly and equitably protect and preserve the rights, interests, liabilities and claims of all persons concerned. Thereafter, the Commissioner presented to the court and the court approved the following plan and agreement.

PLAN

1500 1. Organization of New Company.

The Commissioner, as liquidator, and as such vested with title to all of the properties and assets of the Company, will organize a new corporation (hereinafter referred to as the "New Company") under the laws of California for the purpose of conducting a life and accident and health insurance business. The New Company will have an authorized capital of $1,000,000 consisting of 10,000 shares of the par value of $100 per share, all of one class. Although a stock company, it

1501 will be authorized to issue participating policies on a legal reserve basis. The directors of the New Company will be selected and approved by the Commissioner. The Commissioner will subscribe for and purchase with assets or funds held by him as liquidator of the Old Company all of the authorized stock of the New Company for $3,000,000, which will thus establish the New Company with a paid-in capital of $1,000,000 and a paid-in surplus of $2,000,000. The stock
1502 of the New Company thus issued to the Commissioner as liquidator of the Old Company will be held by the Commissioner subject to the ultimate mutualization of the New Company, as hereinafter provided.

2. Transfer of Assets to New Company.

All of the properties and assets formerly owned by the Old Company and held by the Commissioner as its liquidator will be transferred and conveyed to the New Company, with the exception of the stock of the New Company and certain claims reserved to the Commissioner as liquidator in the agreement hereinafter set forth.
1503

3. Treatment of Policyholders.

Under the plan and agreement the policyholders of the Old Company will be given the following rights:

(a) All policyholders (other than holders of any form of noncancelable income policies hereinafter referred to as "non-can policies") will

1504 be entitled either (1) to accept the assumption and reinsurance by the New Company of their existing policies or (2) to file a claim with the Commissioner as liquidator of the Old Company;

(b) The holders of non-can policies will be entitled either (1) to file a claim with the Commissioner as liquidator of the Old Company, or (2) to accept the assumption and reinsurance by the New Company of their existing policies on the reduced basis provided in the agreement
1505 hereinafter set forth.

4. Assumption by New Company of Expenses, Allowed Claims and Policy Claims.

The New Company will assume and agree to pay the following:

(a) All expenses of the administration of the Commissioner as conservator and liquidator of the Old Company, including such attorneys' fees as may be fixed by the Attorney General of the State of California and approved by the
1506 court in the conservation and liquidation proceeding;

(b) Unpaid taxes, wages, salaries and current operating bills of the Old Company;

(c) All claims filed with the Commissioner as liquidator of the Old Company and finally allowed by the commissioner and/or by the court;

(d) All policy claims of whatever character (except claims on non-can policies), whether

filed, or whether notice of which was filed, prior or subsequent to the order of liquidation; subject, however, to any and all defenses thereto which would have been available to the Old Company;

(e) Only such claims on non-can policies, as were filed, or notice of which was filed with the Old Company prior to the order of liquidation; subject, however, to any and all defenses thereto which would have been available to the Old Company;

Provided, however, that the obligation of the New Company with respect to items (a), (b) and (c) shall be limited to the value of the properties and assets of the Old Company transferred to the New Company pursuant to the agreement hereinafter set forth less the reserves established by the New Company with respect to policies and policy claims of the Old Company assumed and/or reinsured by the New Company.

5. Agents' Contracts.

The New Company will assume all outstanding agents' contracts executed by the Old Company provided, however, (a) no commissions due after the order of liquidation shall be paid on non-can policies on all forms issued prior to, and including, Forms A 291 to A 294, both inclusive, and commissions due after said order on all non-can policies issued on all other forms, the holders of which accept their reinsurance and assumption by the New Company on the re-

1510 duced basis hereinafter provided in the agreement, shall be reduced in proportion to the reduction in disability benefits to the insured under such policies; and (b) the New Company shall not assume or be bound by any arrangement which the Old Company may have made with its agents regarding payment of commissions on policies after lapsation.

6. Treatment of Stockholders of Old Company.

1511 The stockholders of the Old Company shall be entitled to receive pro rata for a period of ten years commencing with the effective date of the agreement hereinafter set forth, the net earnings of the New Company derived from that portion of the business of its nonparticipating life, accident and health departments represented by policies of the Old Company assumed and reinsured by the New Company, remaining after the holders of non-can policies, who shall have
1512 elected to accept the assumption and reinsurance of their policies by the New Company on the reduced basis hereinafter provided in the agreement, shall have been restored to the benefits originally provided in their policies and certain depreciation reserves and additions to surplus shall have been established and made as hereinafter provided in the agreement, and after all finally allowed claims filed with the Commissioner as liquidator shall have been paid.

1513 At the end of said ten-year period, the New Company is to create a fund amounting to ten dollars per one thousand dollars of nonparticipating life insurance assumed and reinsured by the New Company, to which fund the stockholders of the Old Company shall be entitled pro rata, after restoration to non-can policyholders, establishment of reserves and surplus, and payment in full of allowed claims filed with the Commissioner as liquidator, as aforesaid. The New
1514 Company may at its option postpone the creation of said fund, but in such event the New Company shall pay an amount equal to interest on said fund at the rate of six per cent per annum until the principal of said fund shall be created, and such interest payments shall be distributed to the stockholders of the Old Company after the fulfillment of the conditions above referred to.

7. Mutualization of New Company.

1515 As soon as legally possible, the New Company and the Commissioner, as the holder of all of the outstanding stock of the New Company, shall prepare and present to the policyholders of the New Company a plan for its voluntary mutualization in accordance with the laws of the State of California, as then in effect. Such mutualization plan shall contain such terms and provisions not inconsistent with this plan and agreement, as may be required by law or approved by the Commissioner and the New Company. The purchase

price paid by the New Company for the acquisition of its outstanding stock pursuant to such mutualization plan to the extent not required for the satisfaction of item (c) of paragraph 4 above shall be repaid to the New Company.

AGREEMENT

The plan shall be consummated through the execution of the following agreement between the Insurance Commissioner of the State of California, as liquidator of the Old Company, as one party, and the New Company as the other party, and as to any inconsistency between the plan and the following agreement, the latter shall control:

Note: In lieu of the draft form of Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement attached to the Plan as originally proposed, there is attached hereto, in the words and figures following, a copy of the Amended Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement dated July 23, 1936, as executed.

REHABILITATION, SALE AND TRANSFER OF ASSETS AND REINSURANCE AGREEMENT

This Agreement, made and entered into this 23rd day of July, 1936, between Pacific Mutual Life Insurance Company, a California corporation, and Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, a California corporation,

Witnesseth:

Whereas, an order was entered in the Superior Court of the State of California in and for the County of Los Angeles on the 22nd day of July, 1936, in a proceeding entitled "Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, Respondent," by which the court found that The Pacific Mutual Life Insurance Company of California was in such condition that its further transaction of business would be hazardous to its policyholders, creditors and to the public, and that said Company was insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1, of the Insurance Code of the State of California, and by which said order title to all of the assets of said Company, wheresoever situated, was vested in Samuel L. Carpenter, Jr. in his official capacity as Insurance Commissioner of the State of California, and by which order said Commissioner was directed forthwith to take possession of all of the books, records, property, real and personal, and assets of said Company and to conduct as conservator the business of said Company, and enjoining said Company and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until the further order of said court, and pursuant to said order said Commissioner has become

1522 vested with the title to and did take possession of all of the books, records, property, real and personal, and assets of said Company; and

Whereas, said Commissioner as conservator as aforesaid, did thereafter apply to said court for an order for the liquidation of said Company and for an order directing the Commissioner to formulate and submit a plan and agreement of rehabilitation and reinsurance which, in the judgment of the Commissioner, would best preserve
1523 the value of the estate in liquidation, provide for the removal of the causes which made the proceeding necessary, and most fairly and equitably protect the rights and claims of all persons interested therein; and

Whereas, said court thereafter made and entered an order for the liquidation of said Company, appointing the Commissioner as liquidator thereof, and as such vested with title to all of the assets of said Company, and directing the
1524 Commissioner to file such a plan; and

Whereas, said Commissioner submitted to said court a Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement, alleging that said plan and agreement will preserve the value of the assets in liquidation, is fair and equitable to the policyholders, creditors and stockholders of said Company, and protects the legal rights of all interested parties as they now exist; and

1525 Whereas, thereafter said court made and entered an order approving said plan and agreement, and finding that said plan and agreement is fair and equitable and protects the existing legal rights of the policyholders, creditors and stockholders of said Company, and directing that the Commissioner proceed to consummate said plan and execute this agreement;

Whereas, pursuant to said order last mentioned, Pacific Mutual Life Insurance Company
1526 and Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, made and entered into on July 22, 1936, a Rehabilitation Sale and Transfer of Assets and Reinsurance Agreement (hereinafter referred to as the original agreement), and

Whereas said original agreement provided in Paragraph 25 thereof that the same might be
1527 amended at any time while the Commissioner remains liquidator of The Pacific Mutual Life Insurance Company of California; by the consent of said Commissioner and of Pacific Mutual Life Insurance Company, subject to the approval of the court, and

Whereas said Commissioner remains liquidator of The Pacific Mutual Life Insurance Company of California and said Commissioner did on July 23, 1936, propose that Paragraph 15 of the

1528 original agreement be amended in certain respects and filed his petition with the court for the approval of such proposed amendment and for the approval of the execution of this agreement to provide for said amendment, and

Whereas Pacific Mutual Life Insurance Company has consented to said proposed amendment and the court has made its order under date of July 23, 1936, approving said amendment and the execution of this agreement;

1529 Now, Therefore, in consideration of the premises and of the respective undertakings of the parties hereto, it is hereby agreed that the above mentioned original agreement executed under date of July 22, 1936, shall be, and the same hereby is, amended so that Paragraphs 1 to 26, both inclusive, of said original agreement shall read in words and figures as hereinafter set out in Paragraphs 1 to 26, both inclusive, of this agreement, to-wit:

1530 Definitions

1. The parties to this agreement and the persons mentioned herein will be referred to and certain terms used herein are hereby defined as follows:

Samuel L. Carpenter, Jr., in his capacity as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and any successor Commissioner and liquidator, will be referred to as "Commissioner."

1531 The Pacific Mutual Life Insurance Company of California will be referred to as the "Old Company."

Pacific Mutual Life Insurance Company will be referred to as the "New Company."

The Superior Court of the State of California in and for the County of Los Angeles will be referred to as the "Court."

The date and hour of entry of said order of liquidation, to wit, July 22, 1936, at one o'clock
1532 P. M. Pacific Standard Time, will be referred to as the "date of liquidation."

This agreement shall be deemed to have been executed and shall be effective as of the date and hour of entry of said order of liquidation, and said date and hour will be referred to as the "effective date of this agreement."

The phrase "assets of the Old Company" or any similar phrase used in this agreement shall be deemed to mean all books, records, property,
1533 real and personal, tangible and intangible, and all other assets of every kind, character and description whatsoever, and wheresoever situated, owned by the Old Company at the time of the appointment of the Commissioner as conservator which shall not have been applied by him against his subscription for stock of the New Company or disposed of by him in the due course of his administration as conservator or in his administration as liquidator of the Old Company, plus

all property acquired by the Commissioner in either of said capacities and the income therefrom collected by him, except (a) the stock of the New Company held by him, and (b) any and all rights or claims of whatsoever nature which the Old Company or the Commissioner, in his capacity as liquidator of the Old Company, may have against any of the present or past officers, directors or employees, as such, of the Old Company, or against any other person, firm or corporation, by reason of wrongful or illegal acts or omissions of any of the past or present officers, directors or employees of the Old Company, including rights or claims on any fidelity or surety bond or bonds given to or in favor of the Old Company to secure the faithful performance by any of its officers, directors or employees of any of their duties as such.

Outstanding policies of the Old Company known as its Non-Cancelable Income Policies, including the Aggregate form thereof, will be referred to as "Non-Can Policies."

Transfer of Assets

2. The Commissioner shall grant, bargain, sell, assign, convey, transfer, set over and deliver to the New Company the assets of the Old Company.

The Commissioner shall not be required to make manual delivery of any cash or securities deposited by the Old Company with any gov-

ernmental authority as a condition to the conduct of its business, but shall only be required to assign his interest therein, subject to the terms of such deposit.

The Commissioner shall transfer and deliver to the New Company the full amount of all premiums paid to the Commissioner on any policy reinsured and assumed hereunder which have been paid in to the Commissioner on or after the date of liquidation, and the New Company shall credit the holder of such policy with the payment of such premiums accordingly, subject to repayment as hereinafter provided in the event the holder of such policy shall elect not to accept such reinsurance and assumption by the New Company. The New Company shall repay to the Commissioner upon demand any premium received by the New Company hereunder from the Commissioner which was paid by or on behalf of the insured after the date of liquidation to the Commissioner, if the policyholder has filed or shall file a claim in accordance with the Commissioner's notice requiring the filing of claims in the above mentioned cause, and the court shall direct the Commissioner to return the premium so paid.

Subsequent to the effective date of this agreement and for such period of time as the Commissioner may determine, no investment or reinvestment of the assets of the Old Company trans-

1540 ferred to the New Company pursuant to this agreement shall be made without first obtaining the written approval of the Commissioner. The Commissioner hereby agrees that said period shall in no event exceed six months from and after the effective date of this agreement.

Reinsurance and Assumption of Policies Other Than Non-Can Policies

3. The New Company does hereby reinsure and assume, as of the date of liquidation, with 1541 the exception hereinafter provided, the liability of the Old Company under all life, endowment annuity and term policies and contracts of insurance, and all other policies and contracts of insurance, including, without limiting the same to health and accident benefits, waiver of premium disability benefits, permanent and total disability benefits, and all supplementary contracts, annuity contracts and all reinsurance contracts, issued or assumed by the Old Company and outstanding 1542 and in force on the books and records of the Old Company at the date of liquidation, subject, however, to any and all defenses, offsets, counterclaims, cross-complaints and rescission rights against said policies or contracts or against any claims and actions thereon, which would have been available to the Old Company had this agreement not been made; provided, however, that all outstanding Non-Can Policies are not reinsured or assumed under this paragraph and

1543 are hereby expressly excepted from the obligations of the New Company under this paragraph. The determination by the New Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so reinsured hereunder.

Reinstatement of Lapsed Policies

4. The New Company will reinstate any policies heretofore issued, assumed or reinsured by
1544 the Old Company, which are not excepted from the obligations of the New Company contained in the foregoing paragraph and which at the date of liquidation, by their terms, were entitled to reinstatement, provided that all requirements necessary to procure a reinstatement of said policies under their terms are fulfilled to the satisfaction of the New Company.

The New Company will also reinstate, during
1545 the lifetime of the insured and provided the insured is not in such condition as to be eligible for benefits under the policy, without evidence of insurability, any of said policies, with the aforesaid exception, which have lapsed since the date of liquidation, upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made and premiums are paid within sixty (60) days after the effective date of this agreement. Upon the reinstatement of such lapsed policy it shall,

for all purposes, be treated the same as if it had been in force on the date of liquidation and be subject to the terms and conditions of this agreement.

Payment of Policy Claims Other Than Claims on Non-Can Policies

5. The New Company will pay in full, in accordance with the terms and conditions of the policies or other contracts under which the claims shall have been or may be made, and whether or not the claims arose or matured prior or subsequent to the date of liquidation, all claims (except claims on Non-Can Policies) including, without limiting the same to, claims for death benefits, matured endowments, annuity payments, permanent total disability and premium waiver benefits, accident and sickness benefits, payments under policy settlement agreements, policy dividends left at interest with the Old Company prior to the date of liquidation, and payments under all other matured contracts under which the proceeds of policies and contracts were left with the Old Company prior to the date of liquidation; subject, however, to any and all defenses, offsets, counter-claims, cross-complaints and rescission rights against any such claim or claims which would have been available to the Old Company had this agreement not been made.

Reinsurance and Assumption of Non-Can Policies

6. The New Company does hereby reinsure and assume, as of the date of liquidation, the liability of the Old Company under all Non-Can Policies issued by the Old Company and outstanding and in force on the books and records of the Old Company at the date of liquidation, subject, however, to the terms, conditions and limitations, and only to the extent hereinafter specifically provided and subject, further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against such policies or any claims and actions thereon which would have been available to the Old Company had this agreement not been made. The determination by the New Company as to the validity of any policy claim on policies reinsured and assumed under this paragraph and the payment thereof shall be binding upon all persons so reinsured hereunder.

Terms, Conditions, Limitations and Extent of Reinsurance and Assumption of Non-Can Policies

7. The obligation of the New Company with respect to the payment of monthly disability benefits on claims either filed or notice of which is filed with the New Company or any of its predecessors at any time after the date of liquidation under Non-Can Policies reinsured and as-

1552 sumed under the preceding paragraph, subject to restoration as provided in paragraph 8 hereof, shall be limited to payment of the following percentages of the monthly disability benefits originally provided under said policies, according to the following premium classes, respectively:

Premium Class of Policy	Percentage of Original Monthly Benefit Assumed by New Company
1553 1918 Premium class Issued under Rate Books: A 1445, A 1445 Z, A 1445 Y, A 1445 X and A 1445 W. in period from: August, 1918—September, 1921	20%
1921 Premium class Issued under Rate Books: A 1687, A 1687 Z, A 1687 Y, A 1687 X, A 1687 W. in period from: 1554 September, 1921—July, 1926.	35%
1926 Premium class Issued under Rate Books: A 1958, A 1958 Z, A 1958 Y, in period from: July, 1926—February, 1929.	45%
1929 Premium class Issued under Rate Books: A 2293 in period from: February, 1929—January, 1931.	55%

1555 1931 Premium class
Issued under Rate Book:
A 2367 65%
in period from:
January, 1931—March, 1932.

1932 Premium class
Issued under Rate Books:
A 2432, A 2432 Z, A 2499 90%
in period from:
March, 1932—February, 1935.

Aggregate policy
1556 Issued under Rate Books:
A 2499, A 2567 90%
in period from:
October, 1933—July, 1935,

Note: All of the above mentioned Rate Books are Rate Books issued by the Old Company and copies are on file at the office of the New Company at 523 West Sixth Street, Los Angeles, California, and in the offices of the Insurance Commissioners or similar public officials of each
1557 state in which the Old Company has been transacting insurance business.

Notwithstanding the foregoing limitation on the obligation of the New Company to make monthly disability payments on such policies, there shall be no change or reduction in the original premium rates on such policies, and to be entitled to the reinsurance and assumption of his Non-Can Policy by the New Company as aforesaid, the policyholder shall be obligated to continue to make premium payments at the rate originally provided in his policy.

1558 Restoration of Non-Can Benefits

8. The New Company shall be obligated to restore the monthly disability benefits originally provided in the Non-Can Policies reinsured and assumed under this agreement by applying, and only by applying, to such extent and in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance Commissioner of the State of California as hereinafter provided, sums equivalent
1559 to the following:

(a) The net profits derived by the New Company from that portion of the business of its accident and health department represented by accident and health policies reinsured and assumed under this agreement, including all Non-Can Policies so reinsured and assumed hereunder; and

(b) The net profits derived by the New Company from that portion of the business of the
1560 nonparticipating branch of its life department represented by nonparticipating life insurance policies reinsured and assumed hereunder.

As of December 31, 1938, and tri-annually thereafter or at the time of the regular examination of the New Company by the Insurance Commissioner of the State of California, the New Company shall render to such Commissioner an accounting of the net profits, if any, arising from the sources referred to in (a) and (b)

1561 above, including the New Company's proposal as to the extent and manner of the application of sums equivalent to such net profits to the restoration of benefits on said Non-Can Policies. Any such proposal may include provision for proportionate restoration of commissions to agents, who through accepting the assumption of their contracts on the basis hereinafter provided, have received less commissions on such policies than they otherwise would have received. After the 1562 approval of any such proposal by said Commissioner with such changes as he may require therein, the New Company shall proceed to put said proposal into effect. The extent and manner of the restoration, as provided in any such proposal so approved by said Commissioner, shall be binding upon all holders of said Non-Can Policies and other persons interested therein.

The holders of any such Non-Can Policies surrendered to the New Company in connection 1563 with any settlement thereunder shall not be entitled thereafter to any of the benefits of such restoration.

The holders of any such Non-Can Policies which shall have lapsed after the date of liquidation and which shall not have been reinstated either in accordance with their terms or in accordance with the provisions of this agreement, shall not be entitled thereafter to any of the benefits of such restoration.

1564 Reinstatement of Lapsed Non-Can Policies

9. The provisions of paragraph 4 of this agreement with respect to reinstatement of lapsed policies shall apply to Non-Can Policies, subject to the terms, conditions and limitations contained in paragraphs 6 and 7 hereof.

Payment of Claims on Non-Can Policies Filed Prior to Date of Liquidation

10. The New Company shall be obligated to
1565 continue the payment of all disability benefits under Non-Can Policies, claims or notices of claims for which had been filed with the Old Company prior to the date of liquidation, and all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to any such settlement agreements; and subject,
1566 further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company had this agreement not been made.

Moratorium

11. The reinsurance and assumption of obligations by the New Company herein provided for are subject to the condition that the New Company shall not be required, prior to sixty (60)

1567 days, and such additional period as may be determined by the Commissioner, from and after the effective date of this agreement, to make policy loans (except for the purpose of paying premiums on the same policy or on additional policies issued on the same life), or to pay cash surrender values. This provision, however, shall not apply to any increase in values that are accumulated from premium payments or loan repay-
1568 ments which are received subsequent to the date of liquidation.

During such period as the moratorium is in effect the cash surrender option of all policies of the Old Company may be considered as nonexisting, except as provided above, and all policyholders who do not pay their premiums and who are entitled to a guaranteed value will be restricted to the automatic nonforfeiture value
1569 (properly adjusted for any policy indebtedness and accrued interest thereon) under the policy. At the discretion of the New Company, however, the cash surrender value under any policy, properly adjusted for any policy indebtedness and accrued interest thereon, may be allowed whenever it appears, in the sole judgment of the New Company, that the granting of such surrender value will be to the advantage and benefit of the Old Company policyholders as a class.

1570 Assumption of Claims Against Old Company

12. The New Company hereby assumes and agrees to pay the following:

(a) All costs and expenses of the Commissioner in his capacities as conservator or liquidator of the Old Company, including attorneys' fees, as finally approved by the court;

(b) All unpaid taxes legally due the United States, the State of California, and other States, and Counties and Municipalities thereof, in con-
1571 nection with the business and assets of the Old Company, and remaining unpaid;

(c) Wages and salaries legally due to persons employed by the Old Company for services rendered and current bills for office supplies and incidental expenses in connection with the operation of the business of the Old Company and remaining unpaid;

(d) All claims against the Old Company
1572 filed with the Commissioner as liquidator, and finally allowed by the Commissioner and/or by the Court.

The obligation of the New Company with respect to items (a), (b), (c) and (d) above shall be to pay the same, in the order of preference established by law, and shall be limited, in the aggregate, to a amount equal to the value of the assets of the Old Company transferred to the New Company pursuant to this agreement, on the basis of valuation provided in paragraph 13

1573 of this agreement, less the amount of the reserves established by the New Company, with the approval or in accordance with the requirements of the Commissioner, with respect to policies of the Old Company reinsured and assumed by the New Company hereunder, and with respect to policy claims assumed by the New Company hereunder.

Valuation of Assets Transferred to New Company

13. The assets of the Old Company trans-
1574 ferred to the New Company pursuant to this agreement shall be valued at the amounts established therefor in the so-called "Convention Report" made in 1936 by the Commissioner and similar officials of certain other states in which the Old Company did business, with respect to the condition of the Old Company, as of December 31, 1935.

Agents

14. The New Company hereby assumes, sub-
1575 ject to the limitation and exception hereinafter stated, any obligations under any contract heretofore made by the Old Company with any agent (regardless of classification), manager, or supervisor, it being recognized that the services of the agents who produced, or under whose direction or supervision was produced, the business reinsured or assumed hereunder in servicing said business, and the maintaining of same in force is to the ultimate interest and advantage of the policyholders of the Old Company. How-

1576 ever, the obligations of the Old Company to pay commissions on Non-Can Policies reinsured and assumed by the New Company, with the limitations as to disability benefits hereinbefore provided, shall be reduced as follows: (a) No commissions due after the date of liquidation shall be paid on Non-Can Policies on all forms issued prior to and including Forms A291 to A294, both inclusive, and (b) commissions due after the date of liquidation on all Non-Can Policies
1577 issued on all other forms, the holders of which accept the reinsurance and assumption of their policies by the New Company on the reduced basis hereinbefore provided, shall be reduced in proportion to the reduction in disability benefits to the insured under such policies. The New Company shall not assume or be bound by any agreement which the Old Company may have made with agents with respect to payment of commissions on policies after lapsation. To such
1578 extent, in such manner and at such time or times as may be proposed by the New Company and approved by the Insurance Commissioner of the State of California, as provided in paragraph 8 of this agreement, the New Company shall apply its net profits derived from the sources referred to in (a) and (b) of said paragraph 8 to the restoration to agents of the amounts of the reduction in their commissions on policies referred to in (b) of this paragraph to which said agents would have otherwise been entitled.

1579 Additional Payments on Allowed Claims and Payments to Stockholders of Old Company

15. For a period of ten (10) years commencing January 1, 1937, the New Company shall pay to the Commissioner for the benefit of holders of claims filed with the Commissioner and finally allowed by him or by the court, until such claims shall have been paid in full, and thereafter for the benefit of and distribution to the stockholders of the Old Company, the net
1580 profits of the New Company derived from the sources referred to in (a) and (b) of paragraph 8 of this agreement remaining after:

(a) The holders of Non-Can Policies referred to in said paragraph 8 shall have been restored to the full benefits originally stated in their policies as provided in said paragraph; and

(b) The New Company shall have established such reserves as may be deemed necessary by the New Company and the Commissioner for
1581 proper depreciation of the assets allocated to, or held by, the New Company for the benefit of the departments referred to in (a) and (b) of said paragraph 8; and

(c) Restoring to surplus allocated to the participating life department of the New Company the sum of $1,792,118.97, or its equivalent, together with interest thereon to date of restoration at the average rate earned by the New Company during such period on its invested assets; and

1582 (d) Creating a reserve or adding to the surplus of the New Company an amount equal to the amount of policy reserve for Non-Can Policies released by reason of lapsation of such policies reinsured and assumed hereunder in excess of a lapse rate of ten per cent (10%) per year, or occasioned by substitutions or exchanges of such policies for other types of accident or health insurance.

At the end of said ten (10) year period, to-
1583 wit, on January 1, 1947, the New Company shall either (1) create a fund equal to $10 per $1000 of nonparticipating life insurance reinsured and assumed by the New Company under this agreement and then remaining in force, or, (2) until said fund shall be so created, pay an amount equal to interest at the rate of six per cent (6%) per annum on an amount equal to said fund computed as aforesaid, which fund, and, until the creation thereof, said interest payments,
1584 shall be applied, first, to the extent necessary to complete the restoration and establishment of reserves referred to in (a), (b), (c) and (d) above, and, second, to the payment to the Commissioner to the extent necessary to pay any unpaid balance of claims filed with the Commissioner and finally allowed, and thereafter to distribution pro rata to the stockholders of the Old Company.

Any such payments to stockholders of the Old Company, in accordance with the foregoing, shall

1585 either be made pro rata to such stockholders, as their interests may appear according to the stock ledgers of the Old Company, or the New Company may issue to the Commissioner or to such stockholders appropriate certificates of the New Company evidencing its obligation to make such payments. Such certificates of interest may either be issued by the New Company to the Commissioner for distribution by him to stockholders of the Old Company in exchange for their stock
1586 certificates, or, at the election of the New Company, may be issued by the New Company directly to such stockholders upon the surrender of their stock certificates.

Mutualization of New Company

16. The New Company hereby consents to such plan for its voluntary mutualization in accordance with the laws of the State of California as now in effect or hereafter amended, as may
1587 be proposed by the Commissioner, as soon as legally possible; and the Commissioner agrees to propose such mutualization plan, as the holder of the stock of the New Company. Such mutualization plan shall contain such terms and provisions, not inconsistent with this agreement, as may be required by law or approved by the Commissioner and the New Company. The purchase price paid by the New Company for the acquisition of its outstanding stock pursuant to such mutualization plan to the extent not required by the Commis-

1588 sioner as the holder of said stock for the satisfaction of claims against the Old Company, filed with the Commissioner and finally allowed, shall be repaid by the Commissioner to the New Company.

Notice

17. The New Company shall mail promptly to the insured named in all policies and supplementary contracts of the Old Company in force at the date of liquidation, and any assignees
1589 thereof of record, a printed copy of the Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan concerning the Old Company, including a copy of this agreement as executed, to which the New Company may attach its certificate of reinsurance and assumption, inserted in an envelope, first class postage prepaid, addressed to the name and address of each of the persons aforesaid last shown upon the records of the Old Company. By "assignees of record"
1590 is meant assignees appearing upon the records of the Old Company at its Home Office.

Election of Policyholders and Claimants and Effect Thereof

18. Each policyholder and policy claimant of the Old Company may elect either to accept the reinsurance and assumption of his policy or contract and/or any claim thereunder by the New Company, as provided in this agreement, or to file his claim against the Old Company with the

Commissioner, in the manner provided by the Insurance Code of the State of California with respect to the filing of claims against an insurer in the process of liquidation. Persons so filing claims, who shall not withdraw them as hereinafter provided, are herein referred to as dissenting policyholders. The filing of a claim by any dissenting policyholder shall remove the policy or contract in respect of which said claim shall be filed, and the claim of persons under such policy or contract from the benefit of the provisions of this agreement with respect to reinsurance and/or assumption, and shall constitute an irrevocable election, on the part of such policy or contract holder, and his beneficiary and all persons claiming under him, not to accept the benefit of such reinsurance and/or assumption provisions unless such claim shall be withdrawn by the claimant at any time prior to the expiration of sixty (60) days from and after the date of the expiration of the time for filing claims, as provided by law, with the written consent of the New Company, in which event such policy or contract, and the persons interested in the benefits thereunder, shall be entitled to the benefit of such reinsurance and/or assumption provisions and shall be bound by this agreement.

Every person entitled to accept any benefit under this agreement, who shall have indicated his election so to do either by not filing any such claim, or by withdrawing such claim if filed,

1594 shall be considered as assigning to the New Company, all his claims against the Old Company, and the benefits of any rights, securities, liens, or preferences to which he may be entitled by reason of his claims and also as so assigning all interest to which his claims may entitle him in all of the assets of the Old Company, whether located in California or elsewhere. The New Company shall be entitled to assert and prosecute its claims, securities, liens or preferences of all
1595 holders of policies or contracts, issued or assumed by the Old Company, who so assent to or become bound by the provisions of this agreement, and the New Company shall be entitled to assert and obtain in such manner as it may deem best, any rights, securities, liens, or preferences to which the holders of policies or contracts issued or assumed by the Old Company, who shall so assent to or become bound by the provisions of this agreement, would have had.

1596 Each holder of any policy or contract issued or assumed by the Old Company, who shall not have filed his claim against the Old Company with the Commissioner in the manner and within the period required by law, shall be deemed ipso facto to have assented to and become bound by the provisions of this agreement, and entitled to the benefits hereof, subject to all of its terms. No holder of any such policy or contract of the Old Company who shall be deemed to have assented to or become bound by the provisions of

this agreement shall have any rights, securities, liens, or preferences not accorded by this agreement.

Right of the New Company to Prosecute and Defend Claims

19. All claims or demands against the Old Company or its property now the subject of litigation in any court of competent jurisdiction in actions against the Old Company, and any and all claims and demands against the Old Company or its property filed with the Commissioner as liquidator, may be prosecuted and defended until final judgment, and the New Company shall have the right to assist and join in such defense through counsel selected and paid by the New Company, and with all defenses, offsets, counterclaims, cross-complaints and rescission rights that might or could have been available to it, the Old Company, or to the Commissioner as liquidator, including all rights of appeal or review in whatsoever form.

Right of New Company to Settle or Pay Claims Against Old Company

20. In order that claims against the Old Company may be disposed of as speedily and economically as possible, the New Company shall have the right, with the approval of the Commissioner, to settle, compromise or compound any claim or demand against the Old Company or its property, whether or not such claim or demand shall have

1600 been filed with the Commissioner and to pay in discharge thereof such amount as may be mutually agreed upon, and if such claim or demand shall not have been so filed, with like force and effect as if such claim or demand had been duly filed with the Commissioner and finally allowed as above set forth; provided, that no such settlement, compromise or compounding shall affect the right of the New Company to contest and litigate any other claims or demands of similar
1601 character.

Withholding of Assets

21. In the event of the institution of primary receivership or other proceedings in any of the states other than the State of California, wherein the Old Company had assets and in which proceedings the assets located in any such state are liquidated and distributed exclusively to policyholders, creditors, stockholders or other persons resident of said state, such policyholders, cred-
1602 itors, stockholders and other persons interested in assets of the Old Company, who accept in any such proceeding their pro rata share of the distribution of the assets of the Old Company located in said state, shall not be entitled to the benefits provided in this agreement.

Interpretation of Agreement and Accountings Thereunder

22. In the event of any dispute between the New Company and any person entitled to or who

1608 has elected to accept the benefits of this agreement, the determination by the Commissioner as to the interpretation of this agreement shall be conclusive and binding upon both parties to any such dispute. The accounting methods or procedure of the New Company in computing any net profits, earnings or other amounts under this agreement and the amount and character of any and all reserves which may be established by the New Company under this agreement or in the
1604 course of its operations following the execution of this agreement, shall be subject to the approval of the Commissioner, and all such accounting matters and computations and amounts and characters of reserves when so approved by the Commissioner shall be conclusive and binding upon the New Company and all persons entitled to any benefit under this agreement, including, but not limited to, persons who may have elected to file their claims with the Commissioner as liquidator.

1605

Commissioner Not Personally Liable

23. The Commissioner is bound by the provisions of this agreement only in his capacity as such Commissioner and as conservator or liquidator of the Old Company. All undertakings and obligations herein set forth as undertakings or obligations of the Commissioner are made by the Commissioner only in his said capacities and to such extent as he had authority to make the same, and the Commissioner makes no warranty

1606 of his authority to make the same. No personal liability on the part of the Commissioner is assumed under this agreement.

Liabilities of New Company Limited by This Agreement

24. It is understood that the New Company does not assume any liability to any stockholders of the Old Company in any way arising out of or by virtue of their stock holdings in the Old Company, nor any liability of any character or
1607 description to creditors of the Old Company, whether policyholder creditors or others, except as and to the extent provided in this agreement; it being specifically understood that the New Company does not assume any liability of any character or description whatsoever of the Old Company except as and to the extent in this agreement expressly provided, and the provisions of this agreement shall be a complete and adequate defense by the New Company to any ac-
1608 tion, other than an action to enforce the express provisions of this agreement, which may be brought by such stockholders or creditors above mentioned.

Amendments

25. This agreement may be amended at any time while the Commissioner remains liquidator of the Old Company, by the consent of the Commissioner and the New Company, subject to the approval of the court.

1609 Assignability of Agreement

26. This agreement and all rights, duties and obligations hereunder, shall inure to the benefit of and be binding upon the respective parties hereto, their several successors and assigns.

The original agreement, as hereby amended, is ratified, confirmed, approved and continued in full force and effect.

In Witness Whereof, the New Company has
1610 caused this agreement to be executed by its president or vice president, attested by its secretary, and its corporate seal to be hereunto affixed, and the Commisisoner has executed this agreement, the day and year first above written.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

By ASA V. CALL

[Corporate Seal] Its Vice-President

Attest: T. RUSSELL HARRIMAN, JR.

1611 Its Secretary

"New Company"

SAMUEL L. CARPENTER, JR.

As Insurance Commisisoner of the State of California and liquidator of The Pacific Mutual Life Insurance Company of California.

"Commisisoner"

Endorsed: Filed Aug. 14, 1936, at 11:15 a. m. L. E. Lampton, county clerk; by A. G. Stanham, deputy.

1612 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the state of California, petitioner, v. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervenor.

C. N. Wesley, L. S. Larson, E. H. Miller and George W. Struckman, for themselves and all
1613 other persons similarly situated, intervenors. No. 404673.

Proposed Complaint in Intervention.

Now comes C. N. Wesley, L. S. Larson, E. H. Miller and George W. Struckman, by Latham, Watkins & Bouchard, their attorneys, for themselves and on behalf of all persons, and, in particular, policy holders of respondent herein, The Pacific Mutual Life Insurance Company of Cali-
1614 fornia, a corporation, similarly situated, file this, their complaint in intervention herein by leave of this court and for intervention allege as follows:

I.

That, as appears more fully herein, the issues arising hereby raise questions of and are matters of great public interest.

II.

That, except as otherwise set forth herein, at all times mentioned herein:

1615 (a) The Pacific Mutual Life Insurance Company of California was and is a corporation incorporated under the laws of the state of California and has had and still has its principal office and place of business in the city of Los Angeles, county of Los Angeles, state of California; and that, for brevity, said corporation is hereinafter referred to as respondent or as Old Company.

(b) That from and after the time more
1616 specifically set forth herein, Pacific Mutual Life Insurance Company has been and still is a corporation incorporated under the laws of the state of California, and having its principal office and place of business in said city of Los Angeles; and that, for brevity, said corporation is hereinafter referred to as New Company.

(c) That at all times mentioned herein, Samuel L. Carpenter, Jr., was and now is purporting and pretending to act as Insurance Com-
1617 missioner of the State of California pursuant to the provisions of the Insurance Code of the state of California; and that, for brevity, said person is hereinafter referred to as petitioner.

III.

That at all times mentioned herein, said Old Company was authorized to issue, and did issue, a type of policy of insurance known as Non-Cancellable Health and Accident Policy; that said type of policy has been issued to thousands

1618 of persons and that thousands of said policies are still outstanding in the hands of the lawful holders and owners thereof, who have paid all of the premiums required thereunder and otherwise have duly kept and performed all of the provisions and obligations of said policies on their part to be kept and performed.

IV.

Said intervening plaintiffs, C. N. Wesley, L. S. Larson, E. H. Miller and George W.
1619 Struckman, at all times mentioned herein were and still are the holders and owners of such type of policy; that each of said intervening plaintiffs has paid all of the premiums required under the terms and provisions of said policy and has otherwise duly kept and performed all of the provisions and obligations thereof on their part to be kept and performed.

V.

That heretofore, to-wit, on or about the 22nd
1620 day of July, 1936, the above-entitled action or proceeding was commenced in the above-entitled court by said Samuel L. Carpenter, Jr., purporting and pretending to act as Insurance Commissioner of the State of California, as petitioner, against The Pacific Mutual Life Insurance Company of California, a corporation, as respondent, with the knowledge and consent of said respondent, for the purpose of having petitioner authorized, pursuant to certain provisions

of the Insurance Code of the state of California, to be appointed conservator of respondent, to work out a rehabilitation and/or reinsurance plan or agreement concerning said respondent, and, if that should prove to be impracticable, then to wind up and liquidate said respondent.

VI.

That thereafter and prior to the filing of this complaint in intervention, this court, with the knowledge and consent of said respondent, made certain orders and entered certain judgments and decrees herein, all of which appear more fully in the pleadings, records, files, minutes, orders, judgments, decrees and proceedings herein (which said pleadings, records, files, minutes, orders, judgments, decrees and proceedings are hereby incorporated herein in their entirety by reference thereto the same as though set forth herein *in haec verba*); that, purporting to act pursuant to and under the authority of said orders, judgments, and decrees, and the terms and provisions of said Insurance Code, and, in particular, the provisions of division 3, and of article 13 of chapter 1, of part 2, of division 1 thereof, the said petitioner, with the knowledge and consent of said respondent, proceeded to incorporate a new corporation under the laws of the state of California, to-wit, said New Company, and to transfer to said New Company all of the assets of said respondent, including all insurance policies in the life department and

1624 accident department of said respondent except said policies described in paragraph III hereof; that said court has confirmed said sale, with the knowledge and consent of said respondent, but that said new company has intervened herein and is seeking to have said sale further confirmed and its title to said assets quieted, and to have any and all objectors to such sale given an opportunity to make and present their objections.

VII.

1625 That each of the intervening plaintiffs herein, including in and by such designation all persons similarly situated to said plaintiffs, is a holder of such a policy, as same is more particularly described in paragraph III hereof.

VIII.

That the sale of the assets of the Old Company to the New Company, as aforesaid, has left said Old Company without assets and means of
1626 paying any of said policies as same mature, according to the terms and provisions thereof, and from continuing same in full force and effect, or at all; that said New Company has offered to reinsure said policies only upon condition that the holders thereof, intervening plaintiffs among them, submit to a drastic and unwarranted reduction in the benefits payable thereunder, such reductions ranging in amount to from eighty per cent to ten per cent thereof; that unless the acts of said court and of said petitioner, as set

1627 forth herein, particularly in paragraphs V and VI and this paragraph, are set aside and nullified and the assets of said Old Company which were transferred to said New Company, as aforesaid, are restored to said Old Company, said Old Company will be unable to keep said policies in full force and effect, or at all, according to the terms and provisions thereof.

IX.

That intervening plaintiffs herein allege upon
1628 information and belief that they can not purchase in any other company this type of insurance on as favorable terms as those contained in the policies now owned by them in said respondent company.

X.

That, by reason of the premises above set forth, intervening plaintiffs and all others similarly situated, have no speedy and adequate remedy at law, and that unless said Old Com-
1629 pany is restored to a position where it can continue said policies, as set forth in paragraph VIII hereof, intervening plaintiffs and all others similarly situated will suffer irreparable damage and harm.

XI.

That the acts, orders, judgments and decrees of said court herein, and the acts of said petitioner, and of said Old Company, and of said New Company, as set forth herein, and, in particular, in said paragraphs V, VI and VIII

1630 hereof, are unlawful, void, and of no force and effect for the reason that at no time mentioned herein has said Old Company been insolvent within the terms and provisions of said Insurance Code of California, and, in particular, of articles 13 and 14 of chapter 1 of part 2 of division 1 thereof; and, in this connection, intervening plaintiffs further allege, on information and belief, that a few days prior to the 22nd
1631 day of July, 1936, Occidental Life Insurance Company, a California corporation, offered to purchase from said Old Company all of said Old Company's assets, including said policies, and to keep said policies in full force and effect according to the terms and provisions thereof, offering for said assets the sum of ten million dollars ($10,000,000.) which sum it was then and there willing and able to pay; that said offer
1632 has not been withdrawn but may still be accepted; that petitioner valued the assets of said Old Company at three million dollars ($3,000,000.00) in the said sale and transfer thereof to said New Company, and effected said sale and transfer at said valuation; that said figure of three million dollars was far below the actual value or market value of said assets, and that the actual value or market value thereof is ten million dol-

1633 lars, or more; that if the sale and transfer of said assets from said Old Company to said New Company is set aside and the sale of said assets to said Occidental Life Insurance Company is authorized and effected, all of said policies can be and will be continued in full force and effect, according to the terms and provisions thereof, by said Occidental Life Insurance Company.

XII.

1634 That the facts set forth in paragraph XI hereof were known to said petitioner and to said Old Company at the times mentioned and described in paragraphs V, VI and VIII hereof, and to said New Company at the time of and since its incorporation and its acquisition, as aforesaid, of the assets of said New Company; that said facts were not known to said court, but, upon information and belief, that same were
1635 kept from the knowledge of said court by said petitioner, and said Old Company and said New Company; and that the acts of petitioner and said Old Company and said New Company, as heretofore set forth herein, were done for the sole purpose of effecting a means or method by which said policies could and would be cancelled and intervening plaintiffs and others similarly situated would be deprived of the benefits thereof.

1636 XIII.

That all of the acts, orders, judgments and decrees of this court and the acts of said petitioner and of said Old and New Companies, hereinabove set forth or referred to were and are null and void under section 1 of the Fourteenth Amendment to the Constitution of the United States, and under section 16 of article I of the Constitution of the state of California.

1637 XIV.

That if the Insurance Code of the state of California, and, in particular, division 3 and articles 13 and 14 of chapter 1 of part 2 of division 1 thereof, authorized, or shall be construed or deemed to authorize, the acts, orders, judgments and decrees of said court and/or the acts of said petitioner and/or the acts of said Old Company and/or the acts of said New Com-

1638 pany, then said Insurance Code, and, in particular, the portion thereof specifically referred to, are illegal, null and void, and of no force and effect, in that each of them is in conflict with and contrary to, and is forbidden by section 16 of article I of the Constitution of the state of California and by section I of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, intervening plaintiffs demand judgment as follows:

1. Vacating, setting aside and declaring null and void and of no force and effect, each of the acts, orders, judgments and decrees herein of the court which authorized, directed, or confirmed the several acts of said petitioner and of said Old Company and of said New Company, as same are more particularly described, directly or by reference, in the complaint for intervention.

2. Vacating, setting aside and declaring null and void and of no force and effect, each of said acts of said petitioner and of said Old Company and of said New Company.

3. For such other and further order, judgment, decree and relief as shall be just or necessary in the premises.

LATHAM, WATKINS & BOUCHARD,
By GEORGE BOUCHARD,
Attorneys for Intervening Plaintiffs.

Verified.

Endorsed: Filed Aug. 17, 1936, 2:15 p. m. L. E. Lampton, county clerk; by J. MacGregor, deputy.

1642 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. Pacific Mutual Life Insurance Company of California, a corporation, respondent;, Wm. H. Neblett, intervenor. No. 404673.

Answer to Complaint in Intervention of Wm. H. Neblett.

1643

Come now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company and answer the complaint in intervention of Wm. H. Neblett, as follows:

I.

Admit that said Samuel L. Carpenter, Jr., is, and at all times since a time long before the
1644 commencement of these proceedings has been, Insurance Commissioner of the State of California and is acting as such, and that he was appointed Insurance Commissioner by the Governor of the State of California. All other allegations, charges and inferences contained in the paragraph in said complaint in intervention numbered IV are denied.

1645 II.

Answering the paragraph numbered V, it is admitted that said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, instituted these proceedings on or about the 22nd day of July, 1936. All other allegations, charges and inferences in said paragraph contained are denied:

III.

1646 Answering paragraph VI, deny that the proceedings taken by said Insurance Commissioner were taken in accordance with the alleged plan and scheme referred to in said paragraph VI. Deny that the showing made to the court that said Old Company was insolvent within the terms and provisions of the Insurance Code of California was or is false. Deny that all or any 1647 of the orders made by said court were induced by a false representation.

IV.

Deny all the matters and things alleged in the paragraphs in said complaint in intervention numbered VII, VIII, IX, X and XI.

Wherefore, these answering parties pray that said complaint in intervention be dismissed, and for all other proper relief in the premises.

U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney, General,
Attorney for Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California.

ASA V. CALL,
O'MELVENY, TULLER & MYERS,
By ASA V. CALL,
Attorneys for Pacific Mutual Life Insurance Company, Intervenor.

Verified.

Endorsed: Received copy of the within answer this 18 day of August, 1936. R. D. Warner, attorney for intervenor.

Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1651 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent.

Pacific Mutual Life Insurance Company, intervener.

1652 Carl C. Katleman, appearing for himself and all others similarly situated, intervener. No. 404673.

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Petition of Intervention by Carl C. Katleman, for Himself and All Others Similarly Situated.

1653 Comes now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, hereinafter called "Commissioner," and Pacific Mutual Life Insurance Company, a California corporation, hereinafter called "the New Company," and for their answer to the petition in intervention hereinabove referred to, admit, deny and allege as follows:

1654 I.

Admit the allegations of paragraph I of said petition, excepting that they deny that said policies therein mentioned are at this time in full force or are at this time very valuable, and excepting that they have no information or belief sufficient to enable them to answer, and on that ground deny, the allegation that it would be impossible for petitioner to replace said policies in
1655 any company that is writing insurance of this type.

II.

Admit the allegations of paragraph II of said petition, except that they deny that the policies therein mentioned are at this time in full force or very valuable, and except that they have no information or belief sufficient to enable them to answer, and on that ground deny, the allega-
1656 tions as to the residence of the parties named therein, and the allegation that each or any of said parties have requested petitioner to appear for and represent them at this or any hearing, and the allegation that it would be impossible to replace the policies therein mentioned in any company writing this type of insurance.

1657 III.

Deny generally and specifically each and all the allegations contained in paragraphs IV, V and VI of said petition.

IV.

Deny generally and specifically all of the allegations of paragraph VII of said petition, except that they admit that a report has been issued to the Insurance Commissioner of the 1658 State of California and to the Insurance Commissioners of certain other states by certain examiners wherein it is set forth as follows:

"While the difficulties in which this Company finds itself is due principally to inadequate rates on non-cancellable accident and health policies a considerable portion could have been alleviated by the executive officers of the Company following the advice of the Company Actuaries as 1659 early as 1926, when they advised that the basis of calculation of non-cancellable accident and health reserves was inadequate.

"Also, considerable money was lost through a stock syndicate for employees and the making of loans to companies in which certain of the officers were interested.

"These matters should all be investigated."

1660 V.

Deny each and all the allegations contained in paragraph VIII of said petition, except that they have no information or belief sufficient to answer, and on that ground deny, the allegation that in reports heretofore issued by Bests, certain charges have been made with reference to certain investments made by the officers and directors of respondent that resulted in large
1661 losses to respondent.

VI.

Deny each and all the allegations of paragraph IX of said petition, except that they admit and allege that not more than seven of the persons who were officers and directors of respondent are now officers and directors of the New Company.

VII.

1662 Deny each and all the allegations contained in paragraph X of said petition, except that they admit that dividends were paid to the stockholders of respondent corporation to and including the 2nd day of January, 1935, and admit that salaries have been paid to the officers of respondent during the past ten years.

VIII.

Deny generally and specifically each and all the allegations contained in paragraph XI of said petition.

1663 IX.

Deny generally and specifically each and all the allegations contained in paragraph XII of said petition.

Wherefore, Commissioner and the New Company pray that they have judgment; that petitioner Carl C. Katleman take nothing by his said petition; and that Commissioner and the New Company have their costs and disbursements herein.

1664

U. W. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

ASA V. CALL,
1665 O'MELVENY, TULLER & MYERS,
By HOMER I. MITCHELL,
Attorneys for Pacific Mutual Life Insurance Company, Intervener.

Verified.

Endorsed: Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1666 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervenor, R. Rabinowitz, intervener. No. 404673.

1667 **Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of R. Rabinowitz.**

Come now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company, a California corporation, hereinafter called "the-
1668 new company", and for their answer to the complaint in intervention hereinabove referred to, admit, deny and allege as follows:

I.

Allege that they have not sufficient information or belief to enable them to answer the allegations of paragraphs III and V of said complaint, and basing their denial upon that ground deny each and every allegation contained in said paragraphs.

1669 II.

Deny the allegations of paragraphs VI and VII of said complaint.

Wherefore, Commissioner of the new company prays that they have judgment; that intervener R. Rabinowitz take nothing by reason of his complaint; and that they have their costs and disbursements herein expended.

1670 U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

ASA V. CALL and
O'MELVENY, TULLER & MYERS,
1671 By ASA V. CALL
Attorneys for Pacific Mutual Life Insurance Company, Intervener.

Verified.

Endorsed: Received copy of the within this 18 day of Aug. 1936. Lawler & Felix. attorneys for certain Defts.

Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1672 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervener, Andrew J. Copp, Jr., intervener. No. 404673.

1673 **Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of Andrew J. Copp, Jr.**

Come now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company, a California corporation, hereinafter called "the new company", and for their answer to the com-
1674 plaint in intervention hereinabove referred to, admit, deny and allege as follows:

I.

Answering the allegations of paragraph II of said complaint, deny that subsequent to July 22, 1936, The Pacific Mutual Life Insurance Company of California has engaged in the business of life, health or accident insurance, or that since said date it has any assets in the state of California, or elsewhere.

1675 II.

Allege that they have not sufficient information or belief to enable them to answer the allegations of paragraph III of said complaint, and basing their denial upon that ground deny that all of the acts, representations and conduct of Maude Ross Ferguson, as agent for or on behalf of The Pacific Mutual Life Insurance Company of California, as set forth in said complaint, were within the scope of said agency, or were fully
1676 or otherwise authorized by said company, or were binding upon it.

III.

Allege that they have not sufficient information or belief to enable them to answer the allegations of paragraphs IV and V of said complaint, and basing their denial upon that ground deny each and every allegation thereof.

IV.

1677 Allege that they have not sufficient information or belief to enable them to answer the allegations of paragraph VI of said complaint, and basing their denial upon that ground deny that intervener on or about the 15th day of July, 1922, gave his consent to or accepted the alleged proposition of respondent corporation described in paragraph IV of said complaint; upon the same ground deny that respondent corporation duly or otherwise issued insurance substantially in accordance with the representation alleged to

have theretofore been made by respondent corporation by or through its duly authorized agent Maude Ross Ferguson, as set forth in said complaint, or that the insurance so issued was in compliance with intervener's application therefor, or in conformity with respondent corporation's offer; upon the same ground deny that the policies attached to said complaint as Exhibits A and B related to the same matter or were made as parts of substantially one transaction, or were delivered to intervener together or at the same time or as a part of the same transaction, or that the said contracts comprising the insurance sold and issued to intervener by respondent were or are to be taken together as but one entire or indivisible contract.

V.

Allege that they have not sufficient information or belief to enable them to answer the allegations of paragraph VII of said complaint, and basing their denial upon that ground deny each and every allegation thereof.

VI.

Answering the allegations in paragraph IX of said complaint, deny that intervener tendered to respondent corporation a premium of $87.00 or any other sum on the 26th day of July, 1936, or that respondent corporation refused said premium.

1681

VII.

Deny the allegations of paragraph XI of said complaint except admit that the terms of said contract are as set forth in the Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement on file in the above entitled proceeding.

VIII.

Deny the allegations of paragraph XII of said complaint except admit that it is proposed
1682 that the new company will carry on its business at the same location and with the same furniture used by the old company, and except admit that the terms and conditions under which said business is to be carried on are set forth in the Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement on file in the above entitled proceeding, and except admit that the identity of the old corporation is not destroyed.

1683

IX.

Deny the allegations of paragraph XIII of said complaint.

X.

Deny the allegations of paragraph XIV of said complaint, except admit that intervener will have the rights provided for in said Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement on file in the above

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1684 entitled proceeding, and the rights provided by law.

XI.

Deny the allegations of paragraphs XV and XVI of said complaint.

Wherefore, Commissioner of the new company prays that they have judgment; that intervener Andrew J. Copp, Jr., take nothing by reason of his complaint; and that they have
1685 their costs and disbursements herein expended.

U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

ASA V. CALL and
1686 O'MELVENY, TULLER & MYERS,
By ASA V. CALL,
Attorneys for Pacific Mutual Life Insurance Company, Intervener.

Verified.

Endorsed: Received copy of the within answer this 18th day of Aug., 1936. Andrew J. Copp, Jr., W., attorney for Andrew J. Copp, Jr.

Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1687 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervener, Neil S. McCarthy, intervener. No. 404673.

1688 **Answer of Samuel L. Carpenter, Jr., Insurance Commisioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of Neil S. McCarthy.**

Come now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company, a California corporation, hereinafter called "the new company", and for their answer to the com-
1689 plaint in intervention hereinabove referred to, admit, deny and allege as follows:

I.

Answering the allegations of paragraph VI of said complaint, deny that there was no impartial or independent appraisal or investigation into the affairs made by the court previous to the making of said order.

II.

Deny the allegations of paragraphs VII, VIII and X of said complaint.

1690 III.

Deny the allegations of paragraph IX of said complaint, except admit that said orders were all signed without notice to policyholders.

Wherefore, Commissioner of the new company prays that they have judgment; that intervener Neil S. McCarthy take nothing by reason of his complaint; and that they have their costs and disbursements herein expended.

1691 U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

ASA V. CALL, and
O'MELVENY, TULLER & MYERS,
1692 By ASA V. CALL,
Attorneys for Pacific Mutual Life Insurance Company, Intervener.

Verified.

Endorsed: Received copy of the within answer this 10 day of Aug., 1936. LeRoy Anderson, attorney for Neil S. McCarthy.

Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1693 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervener, Wilber G. Katz, Norman Crawford and Robert A. Crawford, interveners. No. 404673.

1694

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Petition in Intervention of Wilber G. Katz, Norman Crawford and Robert A. Crawford.

Come now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company, a
1695 California corporation, hereinafter called "the new company", and, for their answer to the petition in intervention hereinabove referred to, admit, deny, and allege as follows:

I.

Deny the allegations of paragraph 2 of said petition, except admit that said policies were issued by The Pacific Mutual Life Insurance Company of California and contain the provisions set forth in the respective policies referred to in said petition.

1696 II.

Answering the allegations of paragraph 4 of said petition, deny that the only public notice of proceedings was given by newspaper advertisement in newspapers published in the cities of Los Angeles and San Francisco in the state of California. Admit that no publication or notice by mail of the rule requiring objections to be filed by August 12, 1936, was made in the state
1697 of Illinois. Allege that they have not sufficient information or belief to enable them to answer the allegations of said paragraph 4 except those herein specifically denied or admitted and, basing their denial upon that ground, deny all of the allegations of said paragraph, with the exception of those herein specifically denied or admitted.

III.

1698 Answering the allegations of paragraph 5 of said petition, admit that petitions or other papers have been filed in the above entitled proceedings showing that respondent is insolvent. Admit that the provisions of the Plan and Agreement of Rehabilitation and Reinsurance are as set forth in Exhibit A attached to the petition of Samuel L. Carpenter, Jr. herein. Deny the allegations of said paragraph 5 other than those herein specifically admitted.

IV.

Deny the allegations of paragraph 6 of said petition, except admit that the provisions of the plan and agreement therein referred to are set forth in Exhibit A attached to the petition of Samuel L. Carpenter, Jr. herein.

Wherefore, Commissioner and the new company pray that they have judgment; that interveners, Wilber G. Katz, Norman Crawford and Robert A. Crawford, take nothing by reason of their petition; and that they have their costs and disbursements herein expended.

U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

ASA V. CALL and
O'MELVENY, TULLER & MYERS,
By HOMER I. MITCHELL,
Attorneys for Pacific Mutual Life Insurance Company, Intervener.

Endorsed: Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1702 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervener, C. N. Wesley, L. S. Larson, E. H. Miller and George W. Struckman, interveners.

1703 No. 404673.

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of C. N. Wesley, L. S. Larson, E. H. Miller and George W. Struckman.

Come now Samuel L. Carpenter, Jr., Insur-
1704 ance Commissioner of the State of California, and Pacific Mutual Life Insurance Company, a California corporation, hereinafter called "the new company", and, for their answer to the complaint in intervention hereinabove referred to, admit, deny, and allege as follows:

I.

Answering the allegations of paragraph IV of said complaint, allege that they have not sufficient information or belief to enable them

1705 to answer and, basing their denial upon that ground, deny that intervening plaintiffs have otherwise duly kept or performed all of the provisions or obligations of said policies on their part to be kept or performed.

II.

Answering the allegations of paragraph VI of said complaint, deny that petitioner, Samuel L. Carpenter, Jr., transferred all or any insur-
1706 ance policies in the Life Department or Accident Department of respondent. Deny that the court has confirmed the sale of any of said policies. Deny that the new company is seeking to have the sale of any of said policies confirmed or its title thereto quieted.

III.

Deny the allegations of paragraph VIII of said complaint, except admit that assets of the old
1707 company have been transferred to the new company in accordance with the Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement, a copy of which is attached to the petition of Samuel L. Carpenter, Jr. herein and marked Exhibit A.

IV.

Allege that they have not sufficient information or belief to enable them to answer the alle-

gations of paragraph IX of said complaint and, basing their denial upon that ground, deny each and every allegation thereof.

V.

Deny the allegations of paragraphs X, XI, XII, XIII and XIV of said complaint.

Wherefore, Commissioner and the new company pray that they have judgment; that interveners, C. N. Wesley, L. S. Larson, E. H. Miller and George W. Struckman, take nothing by reason of their complaint; and that they have their costs and disbursements herein expended.

U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

ASA V. CALL, and
O'MELVENY, TULLER & MYERS,
By HOMER I. MITCHELL,
Attorneys for Pacific Mutual Life Insurance Company, Intervener.

Verified.

Endorsed: Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1711 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervener, Robert J. Webb, Philip M. Klutzniek, and Hyman H. Alterman, for themselves and all other persons similarly situated, interveners. No.
1712 404-673.

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California and Pacific Mutual Life Insurance Company to Complaint in Intervention of Robert J. Webb, Philip M. Klutznick, and Hyman H. Alterman, for Themselves and All Other Persons Similarly Situated.

1713 Come now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company, a California corporation, hereinafter called "the new company," and for their answer to the complaint in intervention hereinabove referred to, admit, deny and allege as follows:

Answering the first cause of action:

I.

Admit all of the allegations of paragraph II of said complaint, except deny that Samuel L.

Carpenter, Jr. was or now is purporting or pretending to act as Insurance Commissioner of the State of California, but allege that at all times mentioned in said complaint said Samuel L. Carpenter, Jr. was and now is the duly qualified and acting Insurance Commissioner of the State of California and acted as such.

II.

Admit the allegations of paragraphs III, IV and V of said complaint, excepting that they have no information or belief sufficient to enable them to answer the allegation in paragraph IV thereof that intervening plaintiffs therein named have duly kept and performed all of the provisions and obligations of said policies on their part to be kept and performed, and on that ground deny the same; and excepting that they deny the allegation contained in paragraph V thereof that said Samuel L. Carpenter, Jr., purported and pretended to act as Insurance Commissioner, and allege that said person did act as said Insurance Commissioner of the State of California.

III.

Admit the allegations of paragraph VI of said complaint, except that they allege that Commissioner not only purported to act but did act pursuant to and under the authority of the orders, judgments and decrees therein referred to, and the terms and provisions of said insurance code; and except that they deny that said Commissioner

1717 or any person proceeded to or did transfer to said new company, or to any other person, all of the assets of said respondent or any assets other than those ordered to be so transferred by the provisions of the orders of said court, and deny that any assets transferred include all or any insurance policies in the life department or accident department or any department of the respondent corporation, or that all or any of such policies were transferred.

1718 IV.

Admit the allegations of paragraph VII of said complaint.

V.

Answering the allegations of paragraph VIII of said complaint, admit that the old company therein described is without assets and means of paying any of its policies as the same mature according to the terms and provisions thereof and from continuing the same in full force and 1719 effect, or at all, and in that respect allege that all of the assets of said old company were divested from it and vested in Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, by the entry of an order appointing said Commissioner conservator of said respondent corporation made and entered on July 22, 1936, pursuant to the provisions of section 1011 of the Insurance Code of California. Admit that the new company has offered to reinsure the policies in said paragraph referred to

1720 only upon condition that holders thereof submit to a reduction in the benefits payable thereunder, such reductions ranging in amount from 80% to 10% thereof; but deny that such reduction is drastic or unwarranted, and in that connection allege that under the terms of the order of said court, including the plan and agreement of rehabilitation, sale and transfer of assets and reinsurance dated July 22, 1936, as amended July
1721 23, 1936, said policies may be restored to all or part of the original benefits payable thereunder, under the conditions set forth in said plan. Except as hereinabove stated, Commissioner and the new company deny each and all of the allegations of said paragraph.

VI.

In answer to paragraph IX of said complaint allege that they have no information or belief
1722 upon the subject sufficient to enable them to answer the allegations thereof, and upon that ground deny each and every allegation therein contained.

VII.

Deny each and all of the allegations of paragraph X of said complaint.

VIII.

Answering paragraph XI of said complaint, deny that the acts, orders, judgments and de-

1723 crees of the court or any of them, or the acts of said Commissioner, or any of them, or of said Old Company, or any of them, or of the New Company, or any of them, as set forth in said complaint or otherwise are unlawful or void or of no force or effect for the reasons stated therein, or for any reasons. Deny that at no time mentioned therein or in said complaint has said Old Company been insolvent under the 1724 terms and provisions of said Insurance Code of California. Deny that a few days prior to the 22nd day of July, 1936, or at any time, Occidental Life Insurance Company, a California corporation, or any other corporation, offered to purchase from said Old Company all of said Old Company's assets including said policies, or to keep said policies in full force or effect according to the terms or provisions thereof. Deny 1725 that Occidental Life Insurance Company, or any other corporation, offered for said assets, including said policies, the sum of $10,000,000.00 or any other sum; deny that Commissioner or any other persons valued the assets of said Old Company at $3,000,000.00 or any substantially similar sum in the said sale and transfer thereof to said New Company or otherwise and effected said sale and transfer at said valuation; admit that the actual value or market value of the as-

1726 sets of said Old Company transferred to said new Company is $10,000,000.00 or more; deny that if the sale and transfer of said assets from said Old Company to the New Company is set aside or if the sale of said assets to Occidental Life Insurance Company is authorized and effected, all or any of said policies can or will be continued in full force and effect according to the terms and provisions thereof by said Occi-
1727 dental Life Insurance Company, or by any other person.

IX.

Deny that the facts set forth in paragraph XI of said complaint were known to said Commissioner or to said Old Company at any time, or to the New Company at any time, and in that respect allege that the purported facts alleged in Paragraph XI of said complaint are not true,
1728 as hereinabove set forth; deny that any facts were kept from the knowledge of the court by Commissioner or said Old Company, or the New Company, or any other person; deny that the acts of Commissioner or said Old Company, or the New Company, or any acts were done for the sole or any purpose of effecting a means or method by which said policies or any policies could or would be cancelled and intervening

1729 plaintiffs and others similarly situated, or any person, would be deprived of the benefits thereof.

X.

Admit the allegations of paragraph XIII.

Answering the second cause of action:

I.

As an answer to intervening plaintiffs' further and second cause for intervention and cause of 1730 action, deny each and every allegation contained in paragraph I thereof.

Answering the third cause of action:

I.

As an answer to intervening plaintiffs' further and third cause for intervention and cause of action, deny each and every allegation contained in paragraph I thereof.

1731 Answering the fourth cause of action:

I.

As an answer to intervening plaintiffs' further and fourth cause for intervention and cause of action, deny each and every allegation contained in paragraph I thereof.

Answering the fifth cause of action:

I.

As an answer to intervening plaintiffs' further and fifth cause for intervention and cause of

1732 action, deny each and every allegation contained in paragraph I thereof.

Wherefore, Commissioner and the New Company pray that they have judgment; that intervening plaintiffs herein take nothing by reason of their said complaint; and for their costs and disbursements herein expended.

U. S. WEBB,
Attorney General,

1733

By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

ASA V. CALL and
O'MELVENY, TULLER & MYERS,
By HOMER I. MITCHELL,
Attorneys for Pacific Mutual Life Insurance
1734 *Company, Intervener.*

Verified.

Endorsed: Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1735 In the Superior Court of the State of California, in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervener. No. 404-673.

Answer of Samuel L. Carpenter, Jr., Insur-
1736 **ance Commissioner of the State of California and Pacific Mutual Life Insurance Company to Complaint in Intervention of George I. Cochrane, W. H. Davis, Douglas E. C. Moore, and Stanley M. McClung.**

Come now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, hereinafter called "Commissioner," and Pacific Mutual Life Insurance Company, a California
1737 corporation, hereinafter called "the New Company," and for their answer to the complaint in intervention hereinabove referred to, admit, deny and allege as follows:

I.

Admit the allegations of paragraph I of said complaint.

II.

Answering the allegations of paragraph II of said complaint, admit that on or about the 22nd day of July, 1936, at a directors meeting of The

1738 Pacific Mutual Life Insurance Company of California Commissioner appeared accompanied by a deputy attorney general of the state of California and stated to the board of directors that said corporation was insolvent, that he intended to so declare it, and that he proposed to take over the possession and custody of the property thereof; that he stated that the results of the last examination required him to proceed in the above entitled court, in accordance with article 1739 14, division 1, part 2, chapter 1, and that he further stated that he had conceived a plan for the rehabilitation of said corporation, all of which matters were contained in a printed document, a copy of which was handed to each member of the board of directors.

Commissioner and the New Company have no information or belief sufficient to enable them to answer and on that ground deny the allegation that none of the persons named as interveners 1740 in said complaint in intervention referred to who were directors of said corporation and who were present at said meeting had any prior knowledge of the fact that said Commissioner was about to declare the corporation insolvent or take over its property, or assume charge of it, or that said persons or any of them had no knowledge of the fact that all or any of the aforesaid documents had been in the course of preparation for weeks, or for any time. Commissioner and the New Company admit that said documents had been

prepared under the supervision of said Commissioner, with the assistance of certain of the directors and officers of said corporation, but have insufficient information and belief to enable them to answer and on that ground deny that said directors had not before disclosed to the majority of the directors of said corporation, or to any of the persons named as interveners in said complaint, that it was the intention that the corporation be declared insolvent, nor that they or any persons were assisting the Commissioner in the accomplishment of such or any purpose; and on the same ground deny that said documents or any of them were prepared entirely without the knowledge of said persons named as interveners in said complaint.

III.

Answering the allegation of paragraph III of said complaint, Commissioner and the New Company have no information or belief upon the subject sufficient to enable them to answer, and therefore deny that George I. Cochrane, then chairman of the board of directors of said corporation, had been negotiating for some time, or any time, with one of the largest or any insurance company on the Pacific Coast, to the end that a condition in the Pacific Mutual Company created by contingent liability on non-cancellable policies might be corrected, and upon the same ground deny that at the time of said directors meeting, or at any time, said Cochrane

1744 had in his possession a detailed and formal proposal, or any proposal, by said corporation or any corporation or any person which would have the effect, or which said interveners believed would have the effect, of correcting or remedying the situation. Deny that said Cochrane stated to said Commissioner and the board of directors, or either of them, that he was in possession of the proposal above referred to and asked for its consideration, but admit that said
1745 Cochrane stated he had received a proposal for purchase of certain assets of said corporation made by a certain insurance company. Admit that said board of directors were told by said Commissioner that said proposal was unsatisfactory and would not be considered by him. Admit that at said meeting W. H. Davis, a director, moved that the board of directors meeting be adjourned for twenty-four hours to permit time for the consideration of such matters, but
1746 deny that in answering the said request, or at any time, said Commissioner or said Deputy Attorney General told the said W. H. Davis or the other directors, or any other person, that any attempt by them to take any action with respect to the affairs of the company might subject any such person to a felony charge. Deny that thereupon or at any time said George I. Cochrane stated to said Commissioner or to the board of directors that he could not see that under such conditions the directors had any re-

1747 course other than to acquiesce in the plan of the Commissioner, but allege that said Cochrane did so acquiesce. Allege that prior to adjournment of said meeting said board of directors, after duly considering all said documents presented to it by said Commissioners, including said plan, by the unanimous vote of all directors present at said meeting, passed a resolution approving said plan and agreeing to the action of said Commissioner, and authorizing the attorney for
1748 said corporation to consent in court thereto.

IV.

Admit the allegations of paragraph IV of said complaint, except that they deny that the persons therein named or any of them assisted at all in the preparation of any scheme described in said complaint or any plan or scheme at all other than the rehabilitation, sale and transfer of assets and reinsurance plan and agreement presented to the court.

1749

V.

Answering the allegations of paragraph V of said complaint, deny that it was stated to the directors or any of them at the conclusion of the directors meeting aforesaid or at any time that they were no longer directors or that no one other than the Insurance Commissioner had any power to perform any act on the part of the corporation. Admit that Asa V. Call, being the then duly authorized attorney for respond-

1750 ent corporation, appeared in court and filed with said court a written consent of said corporation. Deny that all the papers filed with and orders made by said court were filed and made at the same time. Deny that there was no hearing upon the application made by the Commissioner for an order to liquidate and wind up the affairs of respondent corporation, and in that respect allege that a full hearing was had upon said petition, including the taking of evidence. Deny
1751 that that portion of the order of liquidation that recites that notice has been duly given of the application is wholly or at all untrue, or is contrary to the facts. Deny that the corporation was not represented in court by its duly authorized attorneys or at all, and allege that the corporation was so represented. Deny that the corporation did not consent to the relief prayed for in said application and allege that the corporation did so consent. Admit that after said
1752 court made its order of liquidation, another document which had previously been prepared, being petition for order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of The Pacific Mutual Life Insurance Company of California, was offered to the court and an order permitting same was issued. Deny that the court was without any power or authority whatever to make said order, or any order, or to permit the transfer of the assets of said corporation, for

the reasons given in said complaint or for any reason.

VI.

Admit the allegations of paragraph VI of said complaint.

VII.

Deny, generally and specifically, each and every allegation contained in paragraphs VII, VIII and IX of said complaint.

Wherefore, the Commissioner and the New Company pray that intervening plaintiffs take nothing by their said complaint, and that they have their costs and disbursements herein expended.

U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

ASA V. CALL and
O'MELVENY, TULLER & MYERS,
By HOMER I. MITCHELL,
Attorneys for Pacific Mutual Life Insurance Company, Internener.

Verified.

Endorsed: Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1756 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervener, Harold S. Cook, intervener. No. 404-673.

1757

Answer of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company to Complaint in Intervention of Harold S. Cook.

Come now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and Pacific Mutual Life Insurance Company, a 1758 California corporation, hereinafter called "the new company," and for their answer to the complaint in intervention hereinabove referred to, admit, deny and allege as follows:

I.

Answering the allegations of paragraph VIII of said complaint, deny that concurrently with the filing of the application for appointment of

1759 Conservator petitioner filed an application for an order to liquidate, and allege that the application for an order to liquidate was filed by petitioner subsequent to the filing of the application for appointment of Conservator.

II.

Answering the allegations of paragraph IX of said complaint, deny that concurrently with the
1760 filing of the applications referred to in paragraphs VII and VIII of said complaint petitioner filed a petition for an order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of the old company, and allege that said application last referred to was filed subsequent to the filing of the applications referred to in para-
1761 graphs VII and VIII of said complaint.

III.

Deny the allegations of paragraphs XII, XIV, XV, XVI, XVII and XVIII of said complaint.

Wherefore, Commissioner of the new company prays that they have judgment; that intervener Harold S. Cook take nothing by reason of

his complaint; and that they have their costs and disbursements herein expended.

U. S. WEBB,
Attorney General,
By JOHN L. FLYNN,
Deputy Attorney General,
Attorney for Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

ASA V. CALL and
O'MELVENY, TULLER & MYERS,
By ASA V. CALL,
Attorneys for Pacific Mutual Life Insurance Company, Intervener.

Verified.

Endorsed: Received copy of the within answer this 18 day of August, 1936. Loeb, Walker & Loeb; by Irving M. Walker, attorneys for Harold S. Cook, intervener.

Filed Aug. 18, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1765 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, v. The Pacific Mutual Life Insurance Company of California, respondent, Pacific Mutual Life Insurance Company, intervener. No. 404673.

Response of R. Rabinowitz to Order to Show Cause Why "Rehabilitation Agreement" Should Not Be Confirmed, and Objections to Confirmation Thereof.

1766

Comes now R. Rabinowitz, and by way of response to that order to show cause dated August 14th, 1936, does object to the confirmation of the "Rehabilitation Agreement", therein described. As grounds therefor, your objector avers:

I.

That this objector is and at all times herein mentioned has been the holder and owner of the following policies of health, accident and disability insurance heretofore issued by respondent herein, to-wit:

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1. Policy No. 4641785 (Noncancellable Disability Policy) issued September 14, 1923.

2. Policy No. 4643430 (Noncancellable Disability Policy) issued November 19, 1923.

3. Policy No. 4670940 (Noncancellable Disability Policy) issued July 8, 1926.

4. Policy No. 384061 (Life Insurance with disability provisions) issued March 26, 1928.

1768 II.

That on July 22, 1936, each of the said policies of insurance hereinabove described was in good standing.

III.

That prior to July 22, 1936, this objector did become ill and disabled, at all times since has been and is now ill and disabled.

IV.

1769 That paragraph 10 of the "Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Concerning The Pacific Mutual Life Insurance Company of California" (hereinafter referred to as the "Rehabilitation Agreement") provides:

"The New Company shall be obligated to continue the payment of all disability benefits under Non-Can Policies, claims or notices of claims for which had been filed with the Old Company
1770 prior to the date of liquidation, and all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to any such settlement agreements; and subject, further, to any and all defenses, offsets, counter-claims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company had this agreement not been made."

771

V.

That while no formal written claim or formal written notice of claim was filed with respondent by this objector himself before July 22, 1936, the illness and disability of objector, as above described, did occur prior to said date and does presently continue.

VI.

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Your objector avers that said "Rehabilitation Agreement" is unjust, unfair, inequitable and discriminatory in providing that the New Company shall be obligated to continue the payment of disability benefits, under non-cancellable policies, only when claim or notice of claim was filed thereon prior to July 22, 1936, and in failing to provide that the New Company shall likewise be obligated to make payment in full of all disability benefits under non-cancellable policies where the illness and disability of the assured did commence prior to said date.

773

VII.

That in so discriminating against the holders of policies of insurance who did become ill and disabled before July 22, 1936, the order of the above entitled court confirming said "Rehabilitation Agreement" and said agreement are and each is in violation of the Fourteenth Amendment of the Constitution of the United States and of section 13 of the Constitution of the State of California.

VIII.

This objector does file this petition for and on behalf of himself and all other holders of health, accident and disability policies of insurance issued by respondent who did become ill or disabled prior to July 22, 1936, and who did not, prior to said date, file claim or notice of claim with respondent.

Wherefore, your objector prays:

1. That this court make its order disapproving paragraph 10 of the "Rehabilitation Agreement" and requiring that said paragraph 10 be revised so as to require and obligate the New Company to pay and continue to pay all disability benefits under all non-cancellable policies where the assured therein did become ill and disabled prior to July 22, 1936, and regardless of whether claim or notice of claim for such compensation was filed with respondent prior to July 22, 1936.

R. RABINOWITZ,
By LAWLER & FELIX,
His Attorneys.

Verified.

Endorsed: Received copy of the within this 18 day of Aug., 19..... U. S. Webb, Attorney General, John L. Flynn, deputy, attorneys for petitioner.

Received copy of the within document Aug. 18, 1936, 3:30 p. m. O'Melveny, Tuller & Myers (invalid unless counsigned), by M. A. T.

Filed Aug. 18, 1936, 4:30 p. m. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

1777 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of Cadifornia, petitioner, vs. Pacific Mutual Life Insurance Company of California, a corporation, respondent, Ralph C. Hamlin, intervener. No. 404673.

Complaint in Intervention to Set Aside Order Appointing Conservator and to Disapprove Any Plan Denying Equal Rights to
1778 **All Policyholders.**

Comes now, Ralph C. Hamlin and by leave of court files this, his complaint in intervention herein, and for cause of action in intervention, alleges:

I.

That at all times mentioned herein, the Pacific Mutual Life Insurance Company of California was, and is, a corporation incorporated under the
1779 laws of the state of California and has had, and still has, its principal place of business in the city of Los Angeles, county of Los Angeles, state of California; that for the purpose of brevity, said corporation is hereinafter referred to as "Old Company."

II.

That at all times herein mentioned, the Pacific Mutual Life Insurance Company was, and is, a corporation incorporated under the laws of the

1780 state of California, having its principal offices and place of business in the city of Los Angeles, county of Los Angeles, state of California; and, for the purpose of brevity, said corporation is hereinafter referred to as "New Company."

III.

That at all times herein mentioned, Samuel L. Carpenter, Jr., was, and is, the Insurance Commissioner of the state of California, and for the
1781 purpose of brevity, said Samuel L. Carpenter, Jr., is hereinafter referred to as "Petitioner."

That the orders, judgments and decrees previously entered by this Court have been now set aside and vacated, except that your "Petitioner" remains by order of this Court as Conservator of the assets of said "Old Company."

IV.

That for several years last past "Old Com-
1782 pany" made and executed certain contracts, as part of its insurance business, known and designated as "Non-Cancellable Income Policies," wherein and whereby the said "Old Company" unconditionally guaranteed to the policyholders the payment of certain benefits, for which said "Old Company" received from the policyholders, in consideration of the execution of said contracts, the payment of premiums by the said policyholders.

1783 V.

That at all times herein mentioned the intervener was, and is, the owner and holder of a certain "Non-Cancellable Income Policy" No. 5505732 issued by the respondent, the Pacific Mutual Life Insurance Company of California, a corporation; that intervener has performed all the terms and conditions of said policy on his part to be performed.

VI.

1784 Intervener is informed and believes, and upon such information and belief, alleges that subsequent to the execution by the "Old Company" of the hereinabove referred to "Non-Cancellable Income Policies," it became apparent to the "Old Company" that the rate of premiums charged as a consideration for said contracts was insufficient to establish a reserve sufficiently large to pay the benefits required to be paid under said contracts, and that then and thereafter the said
1785 "Old Company" increased the rate of premium required for said contracts.

VII.

Intervener is informed and believes and, upon such information and belief, alleges that said officers and directors of "Old Company" have been endeavoring to devise some plan, scheme or device wherein and whereby, under the asserted cloak of legality, the policyholders of said "Non-Cancellable Income Policy" contracts with the

"Old Company" would be deprived of the benefits of their contracts, which would, in effect, alter the terms of said contracts and reduce or eliminate the benefits accruing to said contract-holders. Intervener further alleges upon information and belief that in furtherance of said plan, the aforesaid officers and directors of said "Old Company" have persuaded the "Petitioner" herein to make application to this Honorable Court for permission to effect a reorganization, which would *be* in its nature, plan, scheme and proposal, segregate the assets of "Old Company" in which all contract-holders have an equal interest, for the benefit of a certain class of policy contracts, to the serious detriment and injury of contract-holders of "Non-Cancellable Income Policies"; and that such proposed plan contemplating the transfer of certain assets of "Old Company" to "New Company," and the reinsurance of said "Non-Cancellable Income Policies" on a materially reduced benefit schedule, creating as it proposes, a difference between classes of contract, is wholly unjustified, inequitable and has no legal or equitable warrant or authority.

VIII.

That no notice, actual or constructive, was given to intervener as a policyholder of "Old Company" of the rehabilitation plan, sale and transfer of assets of the "Old Company" and the reinsurance plan and agreement of the "Old

1789 Company," to which he is entitled by law, prior to the granting of certain orders, judgments and decrees hereinbefore made and vacated in part by this Court; that intervener has never been given an opportunity to protest such sale and plan and has never consented thereto.

That there were no hearings of the motion for said previous orders and without notice to the policy holders of said "Old Company" as required by section 1016 of the Insurance Code
1790 of the state of California, providing that no such orders should be made until after a full hearing of motions therefor.

IX.

Intervener is informed and believes and, upon such information and belief, alleges that your "Petitioner," as a part of the aforesaid scheme, device and proposal, will again submit the same plan, as heretofore submitted to this Honorable Court, for rehabilitation, sale and transfer of
1791 assets, and reinsurance plan to this Court, for its approval, or some similar plan, which will seriously impair and injure the rights of intervener.

Intervener alleges upon information and belief, that prior to the filing of this action by "Petitioner" there was in process of negotiation a plan for rehabilitation whereby the Occidental Life Insurance Company, a California corporation, had offered to purchase from said "Old Company" all of said "Old Company's" assets and

had offered to reinsure and continue in full force and effect all of the policies of insurance of "Old Company," including the "Non-cancellable Income Policy" of intervener and all other policyholders of said type of policy.

Intervener further alleges upon information and belief that the rehabilitation, sale and transfer of assets and reinsurance plan and agreement of the Pacific Mutual Life Insurance Company of California is not the best possible plan for the protection of policyholders of the "Old Company" as was represented by "Petitioner"; that on the contrary, under said plan the protection and value of said policies of insurance, including that of intervener, will be greatly lessened and impaired. Intervener further alleges upon information and belief that if the sale and transfer of said assets from said "Old Company" to said "New Company" is set aside and the sale of said assets to said Occidental Life Insurance Company is authorized and effected, the interest of all said policyholders, including that of this intervener, will be more fully and adequately protected.

X.

Intervener is informed and believes and, upon such information and belief, alleges the fact to be that said "Old Company" was not insolvent within the terms and provisions of the Insurance Code of the state of California at the time said

1795 order appointing your "Petitioner" as Conservator, was signed by this Court, and that said order is therefore unlawful, void and of no force and effect.

Wherefore, intervener prays judgment as follows: That the Court make its order vacating and setting aside the order of this Court heretofore made herein appointing the said Samuel L. Carpenter, Jr., Conservator of the Pacific Mutual Life Insurance Company of California, a
1796 corporation; that the Court disapprove any rehabilitation plan, sale and transfer of assets and reinsurance plan that will give a preference or superior right to any particular class of policyholders of the Pacific Mutual Life Insurance Company of California, or impair or reduce the contract benefits of any particular class of policyholders; and for such other and further orders and relief as to this Court may seem just and equitable in the premises.

1797

GARNET C. RAINEY,
EDWARD D. NEUHOFF,
By EDWARD D. NEUHOFF,
Attorneys for Intervener.

Verified.

Endorsed: Filed Aug. 19, 1936, 4:05 p. m. L. E. Lampton, county clerk; by C. H. Holdredge, deputy.

1798 In the Superior Court of the State of California, in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of Calfornia, a Corporation, respondent.

Pacific Mutual Life Insurance Company, a Corporation, intervener, Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans, interveners. No. 404673.

1799 **Petition for Leave to File Complaint in Intervention.**

Come Now Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans and allege:

I.

That Dr. Arthur B. Allen has an interest in the above entitled action by reason of his ownership of a Non-cancellable Income Policy No. 1800 4620018, which was heretofore issued by The Pacific Mutual Life Insurance Company of California, a California corporation, and which continues to be in full force and effect.

That Dr. Carl H. Parker has an interest in the above entitled action by reason of his ownership of Non-cancellable Income Policies No. 2659782, 4618163 and 4618164, each of which was heretofore issued by The Pacific Mutual Life Insurance Company of California, a California corporation, and each of which continues to be in full force and effect.

1801 That Lloyd W. Brooke has an interest in the above entitled action by reason of his ownership of Non-cancellable Income Policies Nos. 4610213 and 4624083, each of which was heretofore issued by The Pacific Mutual Life Insurance Company of California, a California corporation, and each of which continues to be in full force and effect.

That I. Blair Evans has an interest in the above entitled action by reason of his ownership
1802 of Non-cancelable Income Policies Nos. 4654273 and 5507766, each of which was heretofore issued by The Pacific Mutual Life Insurance Company of California, a Corporation, and each of which continues to be in full force and effect.

II.

That each of them desires to intervene in this action.

Wherefore, Dr. Arthur B. Allen, Dr. Carl
1803 H. Parker, Lloyd W. Brooke and I. Blair Evans pray that the Court grant leave to them to intervene in the above entitled action.

Dated: August 19, 1936.

DR. ARTHUR B. ALLEN,
DR. CARL H. PARKER,
LLOYD W. BROOKE,
I. BLAIR EVANS,
Petitioners.

W. B. ETHERIDGE,
Attorney for Petitioners.

1804 In the Superior Court of the State of California, in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a Corporation, respondent.

Pacific Mutual Life Insurance Company, a Corporation, intervener, Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans, interveners. No. 404673.

1805 AFFIDAVIT IN SUPPORT OF PETITION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION.

State of California, County of Los Angeles—ss.

I. Blair Evans, being first duly sworn, on oath deposes and says:

That he is one of the persons designated in the accompanying complaint in intervention as plaintiffs therein.

1806 That as appears from the file in the above entitled action in which said plaintiffs propose to intervene, said action involves questions of great public interest, affecting a large number of persons; that each of said plaintiffs is a holder and owner of regularly issued policies of the respondent, The Pacific Mutual Life Insurance Company of California, a California corporation, of the type known as Non-cancellable Income Policies; that each of said plaintiffs has, by reason of the ownership of said policies, a special and

particular interest in said action; that a hearing at which said plaintiffs are entitled to appear and present their said interests to the Court has been set for August 20, 1936, in Department 3 of the above entitled Court; that in order for said plaintiffs to be adequately represented and their interests protected, it is necessary for them to be permitted forthwith and without notice to serve and file as their complaint in intervention herein the document annexed hereto and made a part hereof, the same to be served upon the attorney for Samuel L. Carpenter, Jr., as Insurance Commissioner, upon the attorneys for The Pacific Mutual Life Insurance Company of California, a California corporation, respondent herein, and upon the attorneys for Pacific Mutual Life Insurance Company, a California corporation, an intervener in said action, and upon such other persons, firms and corporations as this Court shall now or later direct.

Affiant makes this affidavit for the purpose of obtaining from this Court a summary order without notice, authorizing and directing the filing and service of such complaint in intervention, as aforesaid.

I. BLAIR EVANS.

Subscribed and sworn to before me this 19th day of August, 1936.

[Seal] MYRTLE S. CRANE.

Notary Public in and for the State of California, County of Los Angeles.

1810 Points and Authorities.

The Court has authority to make the order prayed for.

Section 382, Code of Civil Procedure.

Section 387, Code of Civil Procedure.

W. B. ETHERIDGE,

Attorney for Intervening Plaintiffs.

In the Superior Court of the State of California, in and for the County of Los Angeles.

1811 Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a Corporation, respondent.

Pacific Mutual Life Insurance Company, a Corporation, intervener. Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans, interveners. No. 404673.

1812 ORDER GRANTING LEAVE TO FILE AND SERVE COMPLAINT IN INTERVENTION.

Upon reading the accompanying Complaint in Intervention of Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans and the Affidavit of I. Blair Evans in support thereof, and upon motion of W. B. Etheridge, attorney for the plaintiffs named in said complaint in intervention, and good cause appearing therefor:

It Is Hereby Ordered that Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke

and I. Blair Evans be and they hereby are authorized to intervene as such plaintiffs in the above entitled action; and that they are hereby permitted and authorized to file as their complaint in intervention said document entitled "Complaint in Intervention of Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans."

It Is Hereby Further Ordered that a copy of said "Complaint in Intervention of Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans" be served upon the attorney for Samuel L. Carpenter, Jr. as Insurance Commissioner of the State of California, upon the attorneys for The Pacific Mutual Life Insurance Company of California, a California corporation, and upon the attorneys for Pacific Mutual Life Insurance Company, a California corporation, or in lieu thereof, upon each of said parties or the persons authorized by said parties or their attorneys to accept service of complaints in intervention in this action; and that said service shall constitute due and proper service of their complaint in intervention.

It Is Hereby Further Ordered that the service of said complaint in intervention, as provided hereinabove in this order, may be completed on August 19, 1936.

August 19, 1936.

HENRY M. WILLIS,
Judge.

1816 In the Superior Court of the State of California, in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a Corporation, respondent.

Pacific Mutual Life Insurance Company, a Corporation, intervener. Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans, interveners. No. 404673.

1817

COMPLAINT IN INTERVENTION OF DR. ARTHUR B. ALLEN, DR. CARL H. PARKER, LLOYD W. BROOKE, AND I. BLAIR EVANS.

Come Now Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans, and by leave of the Court first obtained, file this, their complaint in intervention, and For a First Cause of Intervention and for a First Cause of Action, allege as follows:

1818

I.

That the plaintiff, Arthur B. Allen is a resident of Los Angeles County, California, that at the present time he is the owner of a certain policy issued by the respondent herein under date of August 2, 1921; that said policy is known as a Non-cancellable Income Policy bearing No. 4620018; that all of the premiums due under the terms of said policy up to the present time have been paid at or prior to the time same be-

1819 came due, and said policy is at the present time in full force and effect; that said policy is at this time very valuable and plaintiffs have been informed and believe and therefore allege upon information and belief that it would be impossible for the plaintiff, Dr. Arthur B. Allen to replace said policy in any company writing insurance of the same type.

II.

That the plaintiff, Dr. Carl H. Parker, is a
1820 resident of Los Angeles County, California; that at the present time he is the owner of three certain policies issued by the respondent herein under date of July 23, 1919, June 23, 1921, and June 23, 1921, respectively; that said policies are known as Non-cancellable Income Policies bearing Nos. 2659782, 4618163 and 4618164, respectively; that all of the premiums due under the terms of said policies up to the present time have been paid at or prior to the time same
1821 became due, and each of said policies is at the present time in full force and effect; that each of said policies is at the present time very valuable and plaintiffs have been informed and believe and therefore allege upon information and belief that it would be impossible for the plaintiff, Dr. Carl H. Parker, to replace either of said policies in any company writing insurance of the same type.

1822 III.

That the plaintiff, Lloyd W. Brooke, is a resident of Los Angeles County, California, that at the present time he is the owner of two certain policies issued by the respondent herein under date of May 31, 1921, and September 28, 1924, respectively; that said policies are known as Non-cancellable Income Policies bearing Nos. 4610213 and 4624083, respectively; that all of the premiums due under the terms of said poli-
1823 cies up to the present time have been paid at or prior to the time same became due, and said policies and each of them are at the present time in full force and effect; that said policies are at this time very valuable and plaintiffs have been informed and believe and therefore allege upon information and belief that it would be impossible for the plaintiff, Lloyd W. Brooke, to replace either of said policies in any company writing insurance of the same type.

1824 IV.

That the plaintiff, I. Blair Evans is a resident of Los Angeles County, California; that at the present time he is the owner of two certain policies issued by the respondent herein under date of January 5, 1925, and May 24, 1927, respectively; that said policies are known as Non-cancellable Income Policies bearing Nos. 4654273 and 5507766, respectively; that all of the premiums due under the terms of said policies up to

the present time have been paid at or prior to the time same became due, and each of said policies is at the present time in full force and effect; that each of said policies is at the present time very valuable and the plaintiffs have been informed and believe and therefore allege upon information and belief that it would be impossible for the plaintiff, I. Blair Evans, to replace either of said policies in any company writing insurance of the same type.

V.

That, except as otherwise hereinafter alleged, at all times mentioned herein, The Pacific Mutual Life Insurance Company of California was and is a corporation incorporated under the laws of the State of California and has had and still has its principal office and place of business in the City of Los Angeles, County of Los Angeles, State of California; and that, for brevity, said corporation hereinafter sometimes is referred to as Respondent and sometimes is referred to as Old Company.

That from and after the time more specifically set forth hereinafter, Pacific Mutual Life Insurance Company has been and still is a corporation incorporated under the laws of the State of California, and having its principal office and place of business in the City of Los Angeles, County of Los Angeles, State of California; and that, for brevity, said corporation hereinafter some-

1828 times is referred to as Intervener and sometimes is referred to as New Company.

That at all times mentioned herein, Samuel L. Carpenter, Jr., was and now is purporting and pretending to act as Insurance Commissioner of the State of California pursuant to the provisions of the Insurance Code of the State of California; and that, for brevity, said person hereinafter sometimes is referred to as Petitioner.

VI.

1829 That at all times mentioned herein, said Old Company was authorized to issue and did issue policies of insurance of the type known as Non-cancellable Income Policies; that said policies have been issued to thousands of persons and thousands of said policies are still outstanding in the hands of the lawful owners thereof who have paid all the premiums required thereunder and otherwise have duly kept and performed all of the provisions and obligations of said policies on 1830 their part to be kept and performed; and that hereinafter, for brevity, such policies or type of policies are referred to as Policies.

VII.

That heretofore, to-wit, on or about the 22nd day of July, 1936, the above entitled action or proceeding was commenced in the above entitled Court by said Petitioner, purporting and pretending to act as Insurance Commissioner of the State of California, as petitioner, against The

Pacific Mutual Life Insurance Company of California, a California corporation, as respondent, with the knowledge and consent of said Respondent, for the purpose of having Petitioner authorized, pursuant to certain provisions of the Insurance Code of the State of California, to be appointed conservator of the Respondent, to work out a rehabilitation and/or reinsurance plan or agreement concerning said Respondent, and, if that should prove to be impracticable, then to wind up and liquidate said Respondent.

VIII.

That thereafter and prior to the filing of this complaint in intervention, this Court, with the knowledge and consent of said Respondent, made certain orders and entered certain judgments and decrees herein, all of which appear more fully in the pleadings, records, files, minutes, orders, judgments, decrees and proceedings herein (which said pleadings, records, files, minutes, orders, judgments, decrees and proceedings are hereby incorporated herein in their entirety by reference thereto the same as though set forth herein in haec verba); that, purporting to act pursuant to and under the authority of said orders, judgments and decrees, and the terms and provisions of said Insurance Code, and, in particular, the provisions of Division 3, and of Article 13 of Chapter 1, of Part 2, of Division 1 thereof, the said Petitioner, with the knowledge

and consent of said Respondent, proceeded to incorporate a new corporation under the laws of the State of California, to-wit, said New Company and to transfer to said New Company all of the assets of said Respondent, including all insurance policies in the Life Department and Accident Department of said Respondent except said Policies described in Paragraph VI hereof; that said Court has confirmed said sale, with the knowledge and consent of said Respondent, but that said New Company has intervened herein and is seeking to have said sale further confirmed and its title to said assets quieted, and to have any and all objectors to such sale given an opportunity to make and present their objections.

IX.

That each of the intervening plaintiffs herein is a holder of one or more such Policies as same are more particularly described in Paragraphs I, II, III, IV and VI herein.

X.

That the sale of the assets of the Old Company to the New Company, as aforesaid, has left said Old Company without assets or means of paying any of said Policies as same mature, according to the terms and provisions thereof, and from continuing same in full force and effect, or at all; that said New Company has offered to reinsure said Policies only upon condition that the holders thereof, among whom are the inter-

vening plaintiffs, submit to a drastic and unwarranted reduction in the benefits payable thereunder, such reductions ranging in amount to from eighty per cent to ten per cent thereof; that unless the acts of said Court and of said Petitioner, as set forth herein, particularly Paragraphs VII and VIII, and this paragraph, are set aside and nullified and the assets of said Old Company which were transferred to said New Company, as aforesaid, are restored to said Old Company, said Old Company will be unable to keep said Policies in full force and effect or at all, according to the terms and provisions thereof.

XI.

That, by reason of the premises above set forth, intervening plaintiffs have no speedy and adequate remedy at law, and that unless said Old Company is restored to a position where it can continue said Policies, as set forth in Paragraph X hereof, intervening plaintiffs will suffer great and irreparable damage, injury and harm.

XII.

That the acts, orders, judgments and decrees of said Court herein, the acts of said Petitioner, the acts of said Old Company, and the acts of said New Company, as set forth herein, and, in particular, in said Pargraphs VII, VIII and X hereof, are unlawful, void and of no force or effect for the reason that at no time mentioned

herein has said Old Company been insolvent within the terms and provisions of said Insurance Code of California, and, in particular, of Articles 13 and 14 of Chapter 1 of Part 2 of Division 1 thereof; and, in this connection, intervening plaintiffs further allege, on information and belief, that a few days prior to the 22nd day of July, 1936, Occidental Life Insurance Company, a California corporation, offered to purchase from said Old Company all of said Old Company's assets, including said Policies, and to keep said Policies in full force and effect according to the terms and provisions thereof, offering for said assets the sum of Ten Million ($10,000,000.00) Dollars, which sum it was then and there willing and able to pay; that said offer has not been withdrawn, but may still be accepted; that said Petitioner valued the assets of said Old Company at Three Million ($3,000,000.00) Dollars in the said sale and transfer thereof to said New Company, and effected said sale and transfer at said valuation; that said figure of $3.000,000.00 was far below the actual value or market value of said assets, and that the actual value or market value thereof is Ten Million Dollars or more; that if the sale and transfer of said assets from said Old Company to said New Company is set aside and the sale of said assets to said Occidental Life Insurance Company is authorized and effected, all of said

Policies can and will be continued in full force and effect, according to the terms and provisions thereof, by said Occidental Life Insurance Company.

XIII.

That the facts set forth in Paragraph XII hereof were known to said Petitioner and to said Old Company at the times mentioned and described in Paragraphs VII, VIII and X hereof, and to said New Company at the time of and since its incorporation and its acquisiton, as aforesaid, of the assets of said New Company; that said facts were not known to said Court, but, upon information and belief, that same were kept from the knowledge of said Court by said Petitioner, said Old Company and said New Company; and that the acts of Petitioner, said Old Company and said New Company, as heretofore set forth herein, were done for the sole purpose of effecting a means or method by which said Policies could and would be cancelled and intervening plaintiffs herein would be deprived of the benefits thereof.

For a Further and Second Cause for Intervention and Second Cause of Action, intervening plaintiffs reallege and incorporate herein by reference, with the same force and effect as though set forth in haec verba, the whole of the First Cause for Intervention and First Cause of Action, and further allege:

1846 I.

That all of the said acts, orders, judgments and decrees of said Court, all of the said acts of said Petitioner, all of the said acts of said Old Company and all of the said acts of said New Company, hereinbefore set forth and referred to, were and are, and each of them was and is, null, void, and of no force or effect, for the reason that each and every said order, judgment, decree and act was and is in conflict with, and illegal
1847 and void under, the following provisions of the Constitution of the State of California, to-wit:

(a) Sections 7, 11, 13, 16, 21 and 22 of Article I thereof;

(b) Section 1 of Article III thereof;

(c) Sections 24 and 25 of Article IV thereof; and

(d) Section 1 of Article XII thereof.

For a Further and Third Cause for Interven-
1848 tion and Third Cause of Action, intervening plaintiffs reallege and incorporate herein by reference, with the same force and effect as though set forth in haec verba, the whole of the First Cause for Intervention and First Cause of Action, and further allege:

I.

That all of the said acts, orders, judgments and decrees of said Court, all of the said acts of said Petitioner, all of the said acts of said Old

Company and all of the said acts of said New Company, hereinbefore set forth and referred to, were and are, and each of them was and is, null, void, and of no force or effect, for the reason that each and every said order, judgment, decree and act was and is in conflict with, and illegal and void under, Section 1 of the Fourteenth Amendment to the Constitution of the United States.

For a Further and Fourth Cause for Intervention and Fourth Cause of Action, intervening plaintiffs reallege and incorporate herein by reference, with the same force and effect as though set forth in haec verba, the whole of the First Cause for Intervention and First Cause of Action, and further allege:

I.

That if the Insurance Code of the State of California, and, in particular, Division 3 and Articles 13 and 14 of Chapter 1 of Part 2 of Division 1 thereof, authorize, or shall be construed or deemed to authorize, the acts, orders, judgments and decrees of said Court or the acts of said New Company, the said Insurance Code, and, in particular, the portions thereof specifically referred to, are illegal, null, void, and of no force or effect, in that each of them is in conflict with and is contrary to, and is forbidden by, the following provisions of the Constitution of the State of California, to-wit:

1852 (a) Sections 7, 11, 13, 16, 21 and 22 of Article I thereof;

(b) Section 1 of Article III thereof;

(c) Sections 24 and 25 of Article IV thereof; and

(d) Section 1 of Article XII thereof.

For a Further and Fifth Cause for Intervention and Fifth Cause of Action, intervening plaintiffs reallege and incorporate herein by
1853 reference, with the same force and effect as though set forth in haec verba, the whole of the First Cause for Intervention and First Cause of Action, and further allege:

I.

That if the Insurance Code of the State of California, and, in particular, Division 3 and Articles 13 and 14 of Chapter 1 of Part 2 of Division 1 thereof, authorize, or shall be construed or deemed to authorize, the orders, judg-
1854 ments and decrees of said Court, as aforesaid, or the acts of said Petitioner, or the acts of said Old Company, as aforesaid, or the acts of said New Company, as aforesaid, the said Insurance Code, and, in particular, the portions thereof specifically referred to, are illegal, null, void, and of no force or effect, in that said Insurance Code, and, in particular, the said portions theerof, are in conflict with and each of them is contrary to,

and is forbidden by, Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, intervening plaintiffs demand judgment as follows:

1. Vacating, setting aside and declaring null, void and of no force or effect, each of the acts, orders, judgments and decrees herein of this Court which authorized, directed or confirmed the several acts of said Petitioner, the several acts of said Old Company and the several acts of said New Company, as same are more particularly described, directly or by reference, in this complaint in intervention.

2. Vacating, setting aside and declaring null, void and of no force or effect, each of said acts of said Petitioner, each of said acts of said Old Company and each of said acts of said New Company.

3. That it be ordered, decreed and adjudged that the said Policies herein described of the plaintiffs in intervention herein should and shall be treated equally and on the same basis with all other policies issued by the Old Company, and that no single type or group of policies or holders of policies issued by the Old Company be prefered against any other type or group of policies or holders of policies issued by the Old Company.

4. For such other and further order, judgment, decree and relief as shall be just or necessary in the premises.

W. B. ETHERIDGE,
Attorney for Intervening Plaintiffs.

State of California, County of Los Angeles—ss.

I. Blair Evans, being by me first duly sworn, deposes and says: that he is the one of the plaintiffs named in the above and foregoing "Complaint in Intervention of Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans," in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

I. BLAIR EVANS.

Subscribed and sworn to before me this 19 day of August, 1936.

[Seal] MYRTLE S. CRANE.
Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed 3:41 p. m. Aug. 19, 1936. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

1861 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, v. The Pacific Mutual Life Insurance Company of California, respondent, Pacific Mutual Life Insurance Company, intervener. No. 404673.

Return of John Pleasant Oliver to Order to Show Cause.

1862 Comes now John Pleasant Oliver, a policyholder and person interested in the above entitled proceedings and files this, his return to the order to show cause issued by the above entitled Court on the 23rd day of July, 1936, and his objections to the proceedings in said cause as follows:

I.

That at all times herein mentioned, objector was and now is, the owner and holder of Non-
1863 cancellable Income Policy Number 5508440 (Form A 383) issued by The Pacific Mutual Life Insurance Company of California, the respondent above named; that all premiums due upon the policy aforesaid have been paid and said policy is now in full force and effect.

II.

Objector objects to the

a. Confirming and approving and ratifying the permission given with respect to that certain plan and agreement of rehabilitation, sale and

transfer of assets and reinsurance of The Pacific Mutual Life Insurance of California, which said plan and agreement of rehabilitation is referred to in the order to show cause issued herein on the 23rd day of July, 1936 and the carrying out of the terms and provisions thereof;

b. The confirming and approving the action of Samuel L. Carpenter, Jr., as Insurance Commissioner of the state of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and the action of Pacific Mutual Life Insurance Company in making, executing and carrying out that certain agreement provided for in said plan and agreement, a copy of which agreement as executed is attached to the petition referred to in said order to show cause as Exhibit B and that certain amended agreement, a copy of which is attached to said petition as Exhibit D;

c. Confirming and approving the execution and delivery of the deed and bill of sale attached to the petition referred to in said order to show cause as Exhibit C; and the action of said Samuel L. Carpenter, Jr., as Insurance Commissioner of the state of California, and as liquidator of said The Pacific Mutual Life Insurance Company of California, in transferring and setting over to said Pacific Mutual Life Insurance Company, all of the assets of said The Pacific Mutual Life Insurance Company of California;

1867 d. Each, every and all of the proceedings taken and had up to and including the issuance of said order to show cause on the 23rd day of July, 1936, by the Honorable Douglas L. Edmonds, Judge of the above entitled Court;

e. Each, every and all of the proceedings proposed to be taken and had in connection with the above entitled proceedings;

III.

1868 The objections aforesaid are made upon the following grounds, to wit:

a. That said permission and order given with respect to said plan and agreement of rehabilitation is unlawful and void for the reason that no hearing of motion for said permission and order was had as required by section 1016 of the Insurance Code of the state of California;

b. That the proposed plan of rehabilitation is not the best possible plan for the protection of
1869 this objector and other policyholders in The Pacific Mutual Life Insurance Company of California similarly situated;

c. That said plan, if adopted or approved by this Court, will render the policy owned and held by this objector, practically worthless;

d. That said plan undertakes to substitute some fractional liability by the Pacific Mutual Life Insurance Company for the obligations of The Pacific Mutual Life Insurance Company of California to this objector;

1870 e. That said plan, if carried out, would constitute a violation of this objector's rights under sections 7, 11, 13, 16, 21 and 22 of Article 1 and section 1 of Article 3, and section 1 of Article 12 of the Constitution of the state of California, and also section 1 of the 14th amendment to the Constitution of the United States of America.

IV.

1871 This objector objects to any plan or scheme which would impair in any manner or way, the obligation of this objector's contract with the Pacific Mutual Life Insurance Company of California.

V.

This objector objects to all proceedings and orders heretofore or hereafter made by the above entitled Court in the above proceeding on the 1872 ground that each, every and all of the laws and statutes upon which such proceedings or orders were based, are, and each of them is, unconstitutional and void.

VI.

Objector objects to each, every and all of the orders heretofore made in the above entitled proceeding on the grounds and for the reason that the true facts of the case could not and would not justify the making of said order.

1873 VII.

Objector hereby refers to the objection heretofore or hereafter filed by all other persons in a similar situation, and to complaints in intervention heretofore or hereafter filed by persons in a similar situation as this objector in respect to the above entitled proceedings, and by such reference, hereby adopts the said objections and said complaints in intervention of said persons and
1874 incorporates the same herein as a part of this return.

Wherefore, this objector prays that the objections hereinbefore taken to the proceedings in the above entitled matter be allowed and sustained and that appropriate orders be made by the above entitled Court setting aside and vacating each, every and all of the orders heretofore made in the above entitled proceeding and restoring this
1875 objector to the same status that he occupied before said proceedings were instituted.

JOHN PLEASANT OLIVER,
John Oliver,
In Propria Persona.

Verified.

Endorsed: Filed Aug. 19, 1936, 5:01 p. m. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1876 [TITLE OF COURT AND CAUSE.]

Return of Alfred F. MacDonald to Order to Show Cause.

Comes now Alfred F. MacDonald, a policyholder and person interested in the above entitled proceedings and files this, his return to the order to show cause issued by the above entitled court on the 23rd day of July, 1936, and his objections to the proceedings in said cause as follows:

1877 I.

That at all times herein mentioned, objector was and now is, the owner and holder of Noncancelable Income Policy Number 5514395 (Form A 383) issued by The Pacific Mutual Life Insurance Company of California, the respondent above named; that all premiums due upon the policy aforesaid have been paid and said policy is now in full force and effect.

II.

1878 Objector objects to the

a. Confirming and approving and ratifying the permission given with respect to that certain plan and agreement of rehabilitation, sale and transfer of assets and reinsurance of The Pacific Mutual Life Insurance of California, which said plan and agreement of rehabilitation is referred to in the Order to Show Cause issued herein on the 23rd day of July, 1936, and the carrying out of the terms and provisions thereof;

b. The confirming and approving the action of Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and the action of Pacific Mutual Life Insurance Company, in making, executing and carrying out that certain agreement provided for in said plan and agreement, a copy of which agreement as executed, is attached to the petition referred to in said Order to Show Cause as Exhibit B and that certain amended agreement, a copy of which is attached to said petition as Exhibit D;

c. Confirming and approving the execution and delivery of the Deed and Bill of Sale attached to the petition referred to in said Order to Show Cause as Exhibit C; and the action of said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, and as liquidator of said The Pacific Mutual Life Insurance Company of California, in transferring and setting over to said Pacific Mutual Life Insurance Company, all of the assets of said The Pacific Mutual Life Insurance Company of California;

d. Each, every and all of the proceedings taken and had up to and including the issuance of said Order to Show Cause on the 23rd day of July, 1936, by the Honorable Douglas L. Edmonds, Judge of the above entitled court;

1882 e. Each, every and all of the proceedings proposed to be taken and had in connection with the above entitled proceedings.

III.

The objections aforesaid are made upon the following grounds, to-wit:

a. That said permission and order given with respect to said plan and agreement of rehabilitation is unlawful and void for the reason that no hearing of motion for said permission and order
1883 was had as required by Section 1016 of the Insurance Code of the State of California;

b. That the proposed plan of rehabilitation is not the best possible plan for the protection of this objector and other policy holders in The Pacific Mutual Life Insurance Company of Califoria similarly situated;

c. That said plan, if adopted or approved by this court, will render the policy owned and held
1884 by this objector, practically worthless;

d. That said plan undertakes to substitute some fractional liability by the Pacific Mutual Life Insurance Company for the obligations of The Pacific Mutual Life Isurance Company of California to this objector;

e. That said plan, if carried out, would constitute a violation of this objector's rights under sections 7, 11, 13, 16, 21 and 22 of article 1 and section 1 of article 3, and section 1 of article 12

of the Constitution of the state of California, and also section 1 of the 14th amendment to the Constitution of the United States of America.

IV.

This objector objects to any plan or scheme which would impair in any manner or way, the obligation of this objector's contract with The Pacific Mutual Life Insurance Company of California.

V.

This objector objects to all proceedings and orders heretofore or hereafter made by the above entitled court in the above proceeding on the ground that each, every and all of the laws and statutes upon which such proceedings or orders were based, are, and each of them is, unconstitutional and void.

VI.

Objector objects to each, every and all of the orders heretofore made in the above entitled proceeding on the grounds and for the reason that the true facts of the case could not and would not justify the making of said order.

VII.

Objector hereby refers to the objections heretofore or hereafter filed by all other persons in a similar situation, and to complaints in intervention heretofore or hereafter filed by persons in a similar situation as this objector in respect to the above entitled proceedings, and by such

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1888 reference, hereby adopts the said objections and said complaints in intervention of said persons and incorporates the same herein as a part of this return.

Wherefore, this objector prays that the objections hereinbefore taken to the proceedings in the above entitled matter be allowed and sustained and that appropriate orders be made by the above entitled court setting aside and vacating each, every and all of the orders heretofore
1889 made in the above entitled proceeding and restoring this objector to the same status that he occupied before said proceedings were instituted.

ALFRED F. MACDONALD,
In Propria Persona.

Endorsed: Received copy of the within return this 19th day of August, 1936. U. S. Webb, attorney general, John L. Flynn, deputy, attorney
1890 for petitioner.

Received copy of the within return this 19th day of August, 1936. Asa V. Call, attorney for respondent.

Received copy of the within return this 19th day of August, 1936. O'Melveny, Tuller & Myers, M. A. T., attorney for intervenor.

Filed Aug. 19, 1936, 4:41 p. m. L. E. Lampton, county clerk; by C. J. Bergquist, deputy.

1891 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner, etc., plaintiff, vs. The Pacific Mutual Life Insurance Company of California, defendant. No. 404673.

Appearance of Robert Casamajor, Walter A. Barnes, Paul V. Barnes, and Clarence August Siegfreid, and Return to the Order to Show Cause.

1892

1.

Come now Robert Casamajor, Walter A. Barnes, Paul V. Barnes, and Clarence August Siegfreid and each of them makes his appearance herein as a respondent owning and holding a non-cancellable policy of insurance issued by The Pacific Mutual Life Insurance Company of California, and make their return to the order to show cause as issued by the Honorable Doug-
1893 las L. Edmonds, judge of this court, on the 23rd day of July, 1936.

2.

Your respondent, Robert Casamajor, alleges that he is the owner and holder of non-cancellable policy No. 4618790 issued by The Pacific Mutual Life Insurance Company of California, a corporation, on the 9th day of July, 1921, to and in favor of your respondent, Robert Casamajor. Your respondent, Walter A. Barnes, alleges that he is the owner and holder of non-

1894 cancellable policy No. 4624042 issued by The Pacific Mutual Life Insurance Company of California, a corporation, on the 15th day of March, 1922, to and in favor of your respondent, Walter A. Barnes. Your respondent, Paul V. Barnes, alleges that he is the owner and holder of non-cancellable policy No. 4624041 issued by The Pacific Mutual Life Insurance Company of California, a corporation, on the 6th day of June, 1922, to and in favor of your respondent, Paul
1895 V. Barnes. Your respondent, Clarence August Siegfreid, alleges that he is the owner and holder of non-cancellable policy No. 4655494 issued by The Pacific Mutual Life Insurance Company of California, a corporation, on the 30th day of April, 1925, to and in favor of your respondent, Clarence August Siegfreid. That under the terms of said policies an annual premium is required to be paid by your respondents and each of them to The Pacific Mutual Life Insurance Company
1896 of California. Your petitioners and each of them allege that they have paid said annual premiums as and when due, that said policies are in full force and effect, and were in full force and effect on the 22nd day of July, 1936, at the time of the filing of these proceedings herein.

3.

Your petitioners and each of them object to the court making any order confirming and approving, or confirming or approving or ratifying the

proposed plan by which the assets of The Pacific Mutual Life Insurance Company of California, a corporation, have been transferred or are to be transferred to a new corporation known as Pacific Mutual Life Insurance Company; object to the confirmation and approval of the execution and delivery of a deed and bill of sale by Samuel L. Carpenter, Jr. as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California transferring and setting over to Pacific Mutual Life Insurance Company the assets of The Pacific Mutual Life Insurance Company of California, and object to any order approving the terms and conditions upon which it is proposed to make said transfer, to confirm said transfer, to approve said transfer, to-wit, the rehabilitation, sale and transfer of assets and reinsurance plan and agreement as proposed July 22, 1936, by Samuel L. Carpenter, Jr. as Insurance Commissioner of the State of California.

4.

For ground of said objection your respondents and each of them allege that The Pacific Mutual Life Insurance Company of California was, on the 31st day of December, 1935, and has been at all times since said date, insolvent, and that it had been advised by its actuaries for several years prior to December 31, 1935, that it could not continue to write non-cancellable policies at the premium which it was then and thereafter

charging to the policy holder. That there is a deficiency, as your petitioners and each of them are informed and believe and therefore allege, of approximately $23,000,000.00. That the eight directors of the old company, The Pacific Mutual Life Insurance Company of California, who for several years past have directed the destines and policies of said company, are now the directors purportedly selected by Samuel L. Carpenter, Jr. to be the directors of the new Pacific Mutual Life Insurance Company, the company alleged to have been formed by Samuel L. Carpenter, Jr., and to whom he is proposing to transfer and sell the assets of the old company.

5.

That the Insurance Commissioner has attempted to act and is acting arbitrarily and capriciously and in disregard of the established rules of law, and proposes by the said transfer and by the proposed application to transfer to obtain the judicial sanction and approval of this court to an arbitrary act, an act which will deprive your petitioners and the other persons, policy holders of the same class, of their contract rights without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States. That the proposed act of Samuel L. Carpenter, Jr. as Insurance Commissioner of the State of California will, if confirmed by this court, deprive your petitioners of their property without due process

of law and will deprive thousands of other persons similarly situated of their property without due process of law and without notice and without affording the class to which these respondents belong, their day in court.

6.

Petitioners and each of them allege that the proposed plan, if carried out, would in effect transfer all of the assets of the old company, The Pacific Mutual Life Insurance Company of California, together with the reserves created for the benefit of each class of policy holder, together with the reserve created for non-cancellable income policies, to the new corporation, Pacific Mutual Life Insurance Company. That the new company does not propose to be bound by the terms of the policies held by your petitioners and each of them and other policy holders similarly situated, but does propose to take the reserves for the benefit of such holders of the non-cancellable income policies as may agree to the terms which are stated in the proposed plan. That under the terms of said proposed plan the policies of your petitioners and the other non-cancellable income policy holders are destroyed, the terms of the policies are changed, and in the event your petitioners do not consent to such destruction and change then your petitioners are left without a remedy, and the court by the proposed order cancels the policies of your petitioners and performs and does an act at the request and instance

of The Pacific Mutual Life Insurance Company of California which it, the said company, could not under the terms of its agreements with your petitioners, do. That under the terms of the agreements between your petitioners and each of them and The Pacific Mutual Life Insurance Company of California the policies are, as to your petitioners, non-cancellable. That your petitioners and others in the same class have created a trust fund known as a reserve; that said funds are held in trust and were held in trust by The Pacific Mutual Life Insurance Company of California, and of said trust your petitioners and others of the same class are beneficaries. The proposed plan attempts to create different terms, different beneficiaries, the elimination of part of the beneficiaries, the ignoring of the rights of the beneficiaries, and the transfer of said trust funds to a new and different trustee, Pacific Mutual Life Insurance Company, without the consent and against the will of the beneficiaries including your petitioners.

7.

Your respondents and each of them allege this court is without jurisdiction to alter, vary and amend the terms of their contracts or the terms of their non-cancellable income policies. That this court is without jurisdiction to vary the terms of their contracts and/or to place beyond the reach of and the benefit of your petitioners the trust fund created under the terms of their

1909 contracts for their and the benefit of others similarly situated. Your petitioners and each of them allege this court is without jurisdiction and it is contrary to law to transfer and give to others funds held in trust for the benefit of your petitioners and others similarly situated.

8.

Peticioners and each of them allege that it is unjust, inequitable and an arbitrary act of the Corporation Commissioner, not authorized or
1910 justified by the law or the facts, and the confirmation of the proposed agreement would do great, serious and irreparable injury to your petitioners. Your petitioners and each of them allege that because of their increased ages, to-wit, the elapse of time from the making of their original non-cancellable income policies as hereinbefore set forth and the present date, in the case of your petitioner, Robert Casamajor, a period of fifteen years, in the case of your peti-
1911 tioners, Walter A. Barnes and Paul V. Barnes, a period of fourteen years, and in the case of your petitioner, Clarence August Siegfreid, a period of eleven years, and because of the change of their condition of health, to-wit, your petitioners and each of them allege they are in much poorer and impaired health than they were at the time of the taking out of said policies (your petitioners being in good and sound health at the time of the issuance of their respective policies), that petitioners are unable to obtain in-

1912 surance of the same type from any other existing insurance company and will continue to be unable to obtain a similar policy or similar insurance elsewhere throughout the world. That because of the increase of ages and a change in physical conditions your petitioners, if they were able to obtain insurance, would be compelled to pay an exorbitant and impossible premium therefor. Petitioners allege that they have a vested and fixed right in and to the re-
1913 serves created by them and by persons holding policies of the same type in the non-cancellable group.

Wherefore, your petitioners and each of them pray, on behalf of themselves and all other persons similarly situated, that the court deny the petition of Pacific Mutual Life Insurance Company, and that the court make such other and further order as is meet in the premises.

1914 ROBERT CASAMAJOR,
WALTER A. BARNES,
PAUL V. BARNES,
CLARENCE AUGUST SIEGFRIED,
HAHN & HAHN,
By JOSEPH G. PYLE,
Their Attorneys.

Verified.

Endorsed: Filed Aug. 19, 1936, 3:54 p. m. L. E. Lampton, county clerk; by C. H. Holdredge, deputy.

1915 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent, Pacific Mutual Life Insurance Company, intervenor. No. 404673.

Return of Wales Mac Perdue to Order to Show Cause.

1916 Comes now Wales Mac Perdue, a policy holder and person interested in the above entitled proceedings and files through his attorney, Henry C. Huntington, this, his return to the order to show cause issued by the above entitled court on the 23rd day of July, 1936, and his objections to the proceedings in said cause as follows:

I.

That at all times herein mentioned, objector was and now is, the owner and holder of Non-
1917 cancellable Income Policy Number 4647283 and Policy Number 536351, issued by The Pacific Mutual Life Insurance Company, the respondent above named; that all premiums due upon the policies aforesaid have been paid and said policies are now in full force and effect.

II.

Objector objects to the

a. Confirming and approving and ratifying the permission given with respect to that certain plan and agreement of rehabilitation, sale and

transfer of assets and reinsurance to show cause issued herein on the 23rd day of July, 1936, and the carrying out of the terms and provisions thereof;

b. The confirming and approving the action of Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and the action of Pacific Mutual Life Insurance Company, in making, executing and carrying out that certain agreement provided for in said plan and agreement, a copy of which agreement as executed, is attached to the petition referred to in said order to show cause as Exhibit B and that certain amended agreement, a copy of which is attached to said petition as Exhibit D;

c. Confirming and approving the execution and delivery of the deed and bill of sale attached to the petition referred to in said order to show cause as Exhibit C; and the action of said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, and as liquidator of said The Pacific Mutual Life Insurance Company of California, in transferring and setting over to said Pacific Mutual Life Insurance Company, all of the assets of said The Pacific Mutual Life Insurance Company of California;

d. Each, every and all of the proceedings taken and had up to and including the issuance of said order to show cause on the 23rd day of

July, 1936, by the Honorable Douglas L. Edmonds, judge of the above entitled court;

e. Each, every and all of the proceedings proposed to be taken and had in connection with the above entitled proceedings.

III.

The objections aforesaid are made upon the following grounds, to-wit:

a. That said permission and order given with respect to said plan and agreement of rehabilitation is unlawful and void for the reason that no hearing of motion for said permission and order was had as required by section 1016 of the Insurance Code of the state of California;

b. That the proposed plan of rehabilitation is not the best possible plan for the protection of this objector and other policy holders in The Pacific Mutual Life Insurance Company of California similarly situated;

c. That said plan, if adopted or approved by this court, will render the policy owned and held by this objector, practically worthless;

d. That said plan undertakes to substitute some fractional liability by the Pacific Mutual Life Insurance Company for the obligations of The Pacific Mutual Life Insurance Company of California to this objector;

e. That said plan, if carried out, would constitute a violation of this objector's rights under sections 7, 11, 13, 16, 21 and 22 of article 1 and section 1 of article 3, and section 1 of article 12

1924 of the Constitution of the state of California, and also section 1 of the 14th amendment to the Constitution of the United States of America.

IV.

This objector objects to any plan or scheme which would impair in any manner or way, the obligation of this objector's contract with The Pacific Mutual Life Insurance Company of California.

V.

1925 This objector objects to all proceedings and orders heretofore or hereafter made by the above entitled court in the above proceeding on the ground that each, every and all of the laws and statutes upon which such proceedings or orders were based, are, and each of them is unconstitutional and void.

VI.

Objector objects to each, every and all of the 1926 orders heretofore made in the above entitled proceeding on the grounds and for the reason that the true facts of the case could not and would not justify the making of said order.

VII.

Objector hereby refers to the objections heretofore or hereafter filed by all other persons in a similar situation, and to complaints in intervention heretofore or hereafter filed by persons in a similar situation as this objector in respect to the above entitled proceedings, and by such

reference, hereby adopts the said objections and said complaints in intervention of said persons and incorporates the same herein as a part of this return.

Wherefore, this objector prays that the objections hereinbefore taken to the proceedings in the above entitled matter be allowed and sustained and that appropriate orders be made by the above entitled court setting aside and vacating each, every and all of the orders heretofore made in the above entitled proceedings and restoring this objector to the same status that he occupied before said proceedings were instituted.

HENRY C. HUNTINGTON,
HENRY C. HUNTINGTON,
Attorney for Objector.

Verified.

Endorsed: Received copy of the within return to O. S. C. this 19th day of August, 1936. O'Melveny, Tuller & Myers, M. A. T., attorney for Pac. Mutual Life Ins. Co.

Received copy of the within return this 19 day of Aug., 1936. U. S. Webb, attorney general, John L. Flynn, deputy, attorneys for plaintiff.

Received copy of the within return, Asa V. Call, atty. for respondent, this 19 day of Aug., 1936.

Filed Aug. 19, 1936, 4:41 p. m. L. E. Lampton, county clerk; by C. J. Bergquist, deputy.

1930 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. Pacific Mutual Life Insurance Company, intervenor, Arthur D. Wunner, intervenor. No. 404,673.

Complaint in Intervention.

1931 Leave of court so to do having been first obtained, Arthur D. Wunner hereby intervenes in the within action and for his complaint in intervention alleges as follows:

I.

At all times herein mentioned, Samuel L. Carpenter, Jr. has been and now is the duly appointed, qualified and acting Insurance Commissioner of the State of California.

1932 II.

At all times herein mentioned The Pacific Mutual Life Insurance Company of California has been and now is a California corporation organized and existing under and by virtue of the laws of the state of California, and at all said times to July 22, 1936, said corporation has been actively engaged in the life, health and accident insurance and annuity business in the state of California and elsewhere throughout the United

1933 States. Said corporation is hereinafter sometimes referred to as "Old Company".

III.

At all times herein mentioned since about July 22, 1936, Pacific Mutual Life Insurance Company has been and now is a corporation organized and existing under and by virtue of the laws of the state of California. Said corporation is hereinafter sometimes referred to as the "New Company".

1934

IV.

At all times herein mentioned intervenor Arthur D. Wunner, has been and now is general agent of the Old Company at Omaha, Nebraska.

Intervenor has heretofore carried on business as general agent of the Pacific Mutual Life Insurance Company of California and has negotiated and sold innumerable policies of insurance in the said company. By virtue of this fact and

1935 by the terms of his contracts with said company, intervenor is entitled to receive renewals on such policies. The renewals to which intervenor is entitled for the period of his lifetime upon non-cancellable policies in the said company amount to the sum of two hundred ($200) dollars per month, or thereabouts. Intervenor now is forty-eight (48) years of age. Intervenor is further entitled to receive from said company by virtue of contracts made with them, the sum of one thousand five hundred ($1,500) dollars or there-

1936 abouts, as commissions on policies after lapsation.

V.

On or about July 22, 1936, petitioner herein, as Insurance Commissioner of the State of California, filed in the within court an application for an order of said court appointing him conservator of said Old Company and thereafter on the same day an order of said court was made and entered under and by virtue of the terms
1937 of which said petitioner was appointed conservator of said Old Company and all its business, assets and affairs, and said petitioner was ordered to take possession forthwith of all the books, records, property and assets of said Old Company and as conservator to conduct its business for the benefit of its policy holders, creditors and stockholders and of the public in general.

VI.

1938 On July 22, 1936, and concurrently with the filing of the application for appointment of conservator hereinabove in paragraph V referred to, said petitioner filed in the within court an application for an order to liquidate, and thereafter and on the same day an order of said court was made and entered under and by virtue of the terms of which said petitioner was appointed liquidator of the assets and business of said Old Company. All of the right, title and interest of

1939 said Old Company in and to its assets and property was vested and confirmed in said petitioner as liquidator, and said petitioner as liquidator was ordered to conduct, manage and operate the business of said Old Company, to wind up and liquidate its business and to formulate, prepare and submit forthwith if possible for the approval of said court a plan and agreement of reinsurance and rehabilitation or sale and transfer of assets.

1940 VII.

On July 22, 1936, and concurrently with the filing of the applications hereinabove in paragraphs V and VI referred to, said petitioner filed in the within court a petition for an order permitting, approving and authorizing Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement of said Old Company and thereafter and on the same day an order of said court was made and entered approving said 1941 proposed plan and agreement; ordering said petitioner forthwith to organize a new corporation and to subscribe to its capital stock by the use of funds and assets under his control as liquidator of said Old Company, authorizing him forthwith to execute an agreement in form substantially as set forth in said plan, ordering said petitioner forthwith to transfer and set over to said New Company all of the assets of the Old Company, except the stock of said New Com-

1942 pany and except any claims which the Old Company might have against any of its present or past officers, directors or employees or against any other person by reason of wrongful or illegal acts or omissions of any of such past or present officers, directors or employees, authorizing and ordering said petitioner to do any and all things necessary, desirable or proper to carry out the terms of said plan and agreement, and directing the officers, directors, agents and employees of
1943 the Old Company to cooperate with and assist said petitioner and the New Company in the effectuation of said plan by the execution of such documents and the doing of such acts in connection therewith as might be requested of them by said petitioner. A copy of said plan and agreement is attached to the petition for approval thereof on file herein and by this reference the same is incorporated in this complaint in intervention as though fully set forth.

1944

VIII.

On July 23, 1936, said petitioner filed in the within court a petition for approval of an amendment to said plan and agreement and thereafter on the same day said court made and entered its order approving said amendment. A copy of said amendment is attached to said petition for an order approving the same and by this reference it is incorporated herein as though fully set forth.

1945

IX.

Immediately upon the making of the orders hereinabove referred to said petitioner and the New Company executed said plan and agreement and thereupon all of the assets of the Old Company, with the exceptions hereinabove referred to, were transferred and conveyed to the New Company and ever since that time said New Company has been and now is in the sole and exclusive possession thereof and said company
1946 has been and now is conducting the insurance and annuity business heretofore conducted by the Old Company.

X.

The intervenor is informed and believes and therefore alleges that all of the orders hereinabove in paragraphs V, VI and VII referred to, were made concurrently and contemporaneously and without the lapse of any time other than the
1947 time required for the signing thereof. That no hearing or other proceeding in connection therewith was had by or before the within court and that no evidence in connection therewith was presented to or by the said court other than the allegations of the various applications and petitions hereinabove referred to. The intervenor is further informed and believes and therefore alleges that at no time prior to or concurrently with the making of the order hereinabove in

paragraph VIII referred to, was there presented to the within court nor did the court have any impartial or independent appraisals, data or information upon which to base a consideration and determination of the fairness, equity and legality of the proceedings herein taken and/or of said plan and agreement.

XI.

At no time prior to or concurrently with the making of any of said orders was any notice thereof or of the proceedings for the procurement thereof given to intervenor, nor was intervenor or any other agent of the Old Company ever given any right or opportunity to appear and be heard in or in connection with said proceedings and/or the making of said orders or any of them. The consent of the agents of the Old Company to said proceedings has never been requested or obtained nor has the consent of said agents or any of them to the aforesaid transfer and conveyance of assets ever been requested or obtained. In this connection the intervenor alleges that the assets so transferred and conveyed to the New Company were and are substantially all of the assets of the Old Company and were all of the assets of said Old Company which at that time were being or theretofore had been used in the conduct and business of said Old Company.

1951

XII.

The intervenor is informed and believes and therefore alleges that at some time prior to July 22, 1936, the exact date being unknown to him, the directors of the Old Company or some of them acting in concert and collaboration with said petitioner formed a plan or design to eliminate the interests of certain of the shareholders, policy holders, agents and creditors of the Old Company in and to its business and assets, to
1952 create a new corporation which would take over and conduct and operate the assets and business of the Old Company, thereby to hinder, delay and defraud certain of the policy holders and creditors of said Old Company in the collection and satisfaction of their claims, whereas other policy holders and creditors of said Old Company would be preferred in the collection and satisfaction of their claims; and agreed that in order to accomplish said plan and design, pro-
1953 ceedings substantially such as those which have been taken herein should be taken for the purpose of accomplishing said transfer of assets, delay and hindrance of said creditors and preference of others. The intervenor is further informed and believes and therefore alleges that the proceedings had and take herein have been and are but incidents in and part of said preconceived plan and design.

1954 XIII.

The intervenor is informed and believes and therefore alleges that the various findings and determinations of said petitioner as to the condition of the Old Company and the necessity for taking the various proceedings hereinabove alleged to have been taken were arbitrary and capricious and not supported by the facts in that said Old Company was not at any of the times said proceedings were taken insolvent or in such
1955 condition that its further transaction of business would have been hazardous to its policy holders or creditors or to the public. The intervenor is further informed and believes and therefore alleges that the finding and determination of said Commissioner that further efforts to proceed under section 1011 of the Insurance Code would be futile and not to the best interests of its policy holders, creditors, stockholders and the public generally and that the interests of such
1956 persons would be served by granting an order of liquidation, were and are arbitrary and capricious, unfounded in fact and made without any independent and impartial data or information to support them and without any attempt by said petitioner to manage, operate or conduct the business and affairs of said Old Company as conservator and without any attempt on his part by such actual operation to determine whether conservation could be effected and liquidation avoided.

1957

XIV.

The intervenor further alleges that said purported Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement was and is unfair and inequitable and in violation and disregard of the rights of the agents of said Old Company in that said plan and particularly paragraph 14 thereof, does not preserve to said agents the full benefit of their interest in the assets and business of the said Old Company and
1958 their rights as creditors of said company, but on the contrary transfers and preserves for the benefit of said New Company substantially all of the interest of said agents as creditors in the assets and business of the Old Company and further in that the consideration to be paid by the New Company for the Old Company's assets and business is grossly inadequate and substantially less than the fair value of said assets, and further in that intervenor is informed and be-
1959 lieves and therefore alleges that no attempts were made prior to the consummation of said plan and agreement to obtain any offers from others for the purchase of said assets and business or reinsurance of the policy holders of the Old Company or rehabilitation of the Old Company.

XV.

By reason of the foregoing facts, the proceedings had and taken and the orders made and

1960 entered herein are and each of them is void; irregular, arbitrary and without authority in law and said proceedings and orders are and each of them is void and unconstitutional in that they deprive and have deprived the intervenor and others of their property without due process of law in violation of section 1 of article XIV of the amendments to the Constitution of the United States and of section 13 of article I of
1961 the Constitution of the state of California, and further in that they impair and have impaired the obligation of the contracts of said intervenor in violation of section 10 of article I of the Constitution of the United States and of section 16, article I of the Constitution of the state of California, and further that the statute under and in pursuance of which the said proceedings and orders purport to have been taken and made, be-
1962 ing article 14 of chapter 1 of part 2 of the Insurance Code of the state of California, is void and unconstitution in so far as it authorizes and permits said proceedings and orders, in that it violates and contravenes the provisions of the constitutions of the United States and of the state of California hereinabove mentioned.

Wherefore, the intervenor prays that said purported Rehabilitation Sale and Transfer of As-

1963 sets and Reinsurance Plan and Agreement be not approved; that all proceedings had and taken and all proceedings heretofore made herein be vacated and set aside; that the intervenor's costs incurred herein, including a reasonable attorney's fee be allowed and that he have such other and further relief as to the court may seem proper.

PAUL OVERTON and
R. G. BLANCHARD,
1964 By R. G. BLANCHARD,
Attorneys for Intervenor.

Verified.

Endorsed: Received copy of the within this 20th day of Aug., 1936. Asa V. Call, attorney for Pac. Mutual Life Ins. Co. of Calif.

Received copy of the within this 20th day of August, 1936. O'Melveny, Tuller & Myers, M.
1965 A. T., Attorney for Pac. Mutual Life Ins. Co.

Received copy of the within this 20th day of August, 1936. U. S. Webb, attorney general, John L. Flynn, deputy, attorneys for petitioner.

Filed Aug. 20, 1936, 9:55 a. m. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

1966 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent, Pacific Mutual Life Insurance Company, intervenor. No. 404673.

Return of Clara Margaret Grannan and Edward Everet White to Order to Show

1967 **Cause.**

Come now Clara Margaret Grannan and Edward Everet White, policy holders and persons interested in the above entitled proceedings and file this, their return to the order to show cause issued by the above entitled court on the 23rd day of July, 1936, and their objections to the proceedings in said cause as follows:

I.

1968 That at all times herein mentioned, objectors were and now are, the owners and holders of non-cancellable income policies; the objector, Clara Margaret Grannan, was and now is, the owner and holder of Non-cancellable Policy Number 754631, issued by The Pacific Mutual Life Insurance Company of California, the respondent above named, which policy contains a total disability benefit clause, and that all premiums due upon said policy have been paid and said policy is now in full force and effect.

1969 The objector, Edward Everet White, was and now is, the owner and holder of Non-cancellable Policy Number 413699, issued by The Pacific Mutual Life Insurance Company of California, the respondent above named, which policy contains a total disability benefit clause, and that all premiums due upon said policy have been paid and said policy is now in full force and effect.

II.

Objectors object to the

1970 A. Confirming and approving and ratifying the permission given with respect to that certain plan and agreement of rehabilitation, sale and transfer of assets and reinsurance of The Pacific Mutual Life Insurance of California, which said plan and agreement of rehabilitation is referred to in the order to show cause issued herein on the 23rd day of July, 1936, and the carrying out of the terms and provisions thereof;

1971 b. The confirming and approving the action of Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of The Pacific Mutual Life Insurance Company of California, and the action of Pacific Mutual Life Insurance Company, in making, executing and carrying out that certain agreement provided for in said plan and agreement, a copy of which agreement as executed, is attached to the petition referred to in said order to show cause as Exhibit B and that certain

1972 amended agreement, a copy of which is attached to said petition as Exhibit D;

c. Confirming and approving the execution and delivery of the deed and bill of sale attached to the petition referred to in said order to show cause as Exhibit C; and the action of said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, and as liquidator of said The Pacific Mutual Life Insurance Com-
1973 pany of California, in transferring and setting over to said Pacific Mutual Life Insurance Company, all of the assets of said The Pacific Mutual Life Insurance Company of California;

d. Each, every and all of the proceedings taken and had up to and including the issuance of said order to show cause on the 23rd day of July, 1936, by the Honorable Douglas L. Edmonds, judge of the above entitled court;

1974 *C.* Each, every and all of the proceedings proposed to be taken and had in connection with the above entitled proceedings.

III.

The objections aforesaid are made upon the following grounds, to-wit:

a. That said permission and order given with respect to said plan and agreement of rehabilitation is unlawful and void for the reason that no

1975 hearing of motion for said permission and order was had as required by section 1016 of the Insurance Code of the state of California;

b. That the proposed plan of rehabilitation is not the best possible plan for the protection of these objectors and other policy holders in The Pacific Mutual Life Insurance Company of California similarly situated;

c. That said plan, if adopted or approved by
1976 this court, will render the policies owned and held by these objectors, practically worthless;

d. That said plan undertakes to substitute some fractional liability by the Pacific Mutual Life Insurance Company for the obligations of The Pacific Mutual Life Insurance Company of California to these objectors.

e. That said plan, if carried out, would constitute a violation of these objectors' rights un-
1977 der sections 7, 11, 13, 16, 21 and 22 of article 1 and section 1 of article 3, and section 1 of article 12 of the Constitution of the state of California, and also section 1 of the 14th amendment to the Constitution of the United States of America.

IV.

These objectors object to any plan or scheme which would impair in any manner or way, the obligation of these objectors' contract with The

1978 Pacific Mutual Life Insurance Company of California.

V.

These objectors object to all proceedings and orders heretofore or hereafter made by the above entitled court in the above proceeding on the ground that each, every and all of the laws and statutes upon which such proceedings or orders were based, are, and each of them is, unconstitutional and void.

1979

VI.

Objectors object to each, every and all of the orders heretofore made in the above entitled proceeding on the grounds and for the reason that the true facts of the case could not and would not justify the making of this order.

VII.

Objectors hereby refer to the objections heretofore or hereafter filed by all other *person* in a 1980 similar situation, and to complaints in intervention heretofore or hereafter filed by *person* in a similar situation as these objectors in respect to the above entitled proceedings, and by such reference, hereby adopt the said objections and said complaints in intervention of said persons and incorporate the same herein as a part of this return.

Wherefore, these objectors pray that the objections hereinbefore taken to the proceedings in

the above entitled matter be allowed and sustained and that appropriate orders be made by the above entitled court setting aside and vacating each, every and all of the orders heretofore made in the above entitled proceeding and restoring these objectors to the same status that they occupied before said proceedings were instituted.

Dated: August 20, 1936.

CLARA MARGARET GRANNAN,
EDWARD EVERET WHITE,
By M. W. PURCELL,
Their Attorney.

Endorsed: Received copy of the within return of Clara Margaret Grannan and Edward Everet White to order to show cause this 20th day of August, 1936, U. S. Webb, attorney general, by John L. Flynn, deputy, attorney for petitioner.

Received copy of the within return of Clara Margaret Grannan and Edward Everet White to order to show cause this ..... day of August, 1936. Asa V. Call & O'Melveny, Tuller & Myers, by W. B. Carman, Jr., attorney for Pac. Mut. L. I. Co.

Filed Aug. 20, 1936, 3:49 p. m. L. E. Lampton, county clerk; by C. H. Holdredge, deputy.

1984 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404-673.

Objections of Ben S. Hunter, Appearing in Response to "Order to Show Cause With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement" Dated August 14, 1936.

1985 Comes now Ben S. Hunter, one of the persons upon whom the above entitled order to show cause has been duly served, and in response to the same respectfully shows:

I.

That he is the owner of the following policies issued by The Pacific Mutual Life Insurance
1986 Company of California, namely:

Life Insurance Policy No. 425051	$ 7000.00
Life Insurance Policy No. 459268	8000.00
Non-Cancellable Income Policy No. 2667857	10000.00
Non-Cancellable Income Policy No. 4637715	5000.00
Accident Insurance Policy No. 4734845	20000.00

all of which are now in full force and effect and upon which all premiums which have matured and become due have been paid.

1987 II.

That he objects to the making of each of the orders described in said Order to Show Cause With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement upon the following grounds:

(a) That the orders sought to be ratified are void in that they were made by a judge having an adverse interest; that they were made without due or adequate notice, and that the court is 1988 without power or jurisdiction to ratify or approve a void order;

(b) That the court is without authority to authorize the organization of a new company, as provided for in said orders and in said so-called "Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement" (hereinafter for the purpose of convenience referred to as the "Rehabilitation Agreement");

1989 (c) That no authority exists in law which authorizes or permits the Insurance Commissioner of the State of California to use the assets of an insolvent insurance company for the purpose of organizing a new insurance company, and that the said Insurance Commissioner is without authority, as commissioner, conservator, liquidator or otherwise, to purchase stock in an insurance company;

(d) That the moneys which the said Insurance Commissioner proposes to use for the pur-

chase of such stock, and the moneys which the Insurance Commissioner has used and which he proposes to use in paying the expenses incident to the carrying out of the Rehabilitation Agreement, all properly belong to and should be a part of the reserves apportioned to the non-cancellable income policies, and that the Insurance Commissioner is without power to use such assets for the purpose of protecting policy holders of another and different class;

(e) That the Insurance Commissioner and the court are, and that each of them is, without power to prefer one class of policy holders over another class, and that said attempted sale of assets is a sale in name only and is made for the purpose of accomplishing in an apparently legal manner that which it is unlawful to do;

(f) That the court has no power to prefer holders of life insurance policies in The Pacific Mutual Life Insurance Company of California over holders of non-cancellable income policies in the same company;

(g) That the said Insurance Commissioner is without power to enter into a contract of reinsurance which prefers one class of risks over another;

(h) That the said Insurance Commissioner is without power to part with the assets secur-

1993 ing the contracts of insurance of The Pacific Mutual Life Insurance Company of California without reinsuring the risks covered thereby, and that he is without power to reinsure a part only of the risks;

(i) That the orders herein sought to be ratified are unjust, unconscionable and inequitable;

(j) That this court of equity is lending its aid to prefer one class of creditors over another

1994 class of creditors

(k) That it is an abuse of discretion for the said Insurance Commissioner to transfer assets of an insolvent company to a new company and entrust the management of the assets of the insolvent company to the same management which led the company into its insolvency, and that it is entirely beyond the authority conveyed upon him by statute;

1995 (l) That the orders herein sought to be ratified permitting the transfer of the assets of the insolvent company to a new company, thereby placing all of the assets of the company behind the life insurance policies and disregarding the obligations of the insolvent company to its holders of non-cancellable income policies, violates section 10 of article I of the Constitution of the United States; and

1996 (m) That the orders herein sought to be ratified permitting the transfer of the assets of the insolvent company to a new company, thereby placing all of the assets of the company behind the life insurance policies and disregarding the obligations of the non-cancellable income policies, violates the XIVth Amendment to the Constitution of the United States.

Wherefore, this objector prays that said Order to Show Cause With Respect to Rehabilita-
1997 tion, Sale and Transfer of Assets and Reinsurance Plan and Agreement be dismissed; that none of the orders set forth therein be made, and that each of the orders heretofore made and therein sought to be ratified, be vacated and set aside.

BEN S. HUNTER,
BEN S. HUNTER,
In Propria Persona.

Verified.

1998 Endorsed: Received copy of the within objections of Ben S. Hunter this 20 day of August, 1936. ....., attorney for petitioner.

Received copy of the within ..... this ..... day of ....., 19..... O'Melveny, Tuller & Myers, attorney for New Company.

Filed Aug. 20, 1936, 10:10 a. m. L. E. Lampton, county clerk; by Paul F. Rau, deputy.

1999 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Pacific Mutual Life Insurance Company, intervenor, Neil S. McCarthy, intervenor. No. 404-673.

2000 **Objections and Answer of Neil S. McCarthy to Petition With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Dated August 14, 1936; Application for Order to Liquidate Dated August 13, 1936; and Order to Show Cause Dated August 14, 1936.**

Comes now Neil S. McCarthy, intervenor herein, and, in response to the order to show cause
2001 with respect to rehabilitation, etc., dated August 14, 1936 heretofore issued herein, the petition with respect to rehabilitation, sale, etc., heretofore filed herein dated August 14, 1936, and to the application for order to liquidate heretofore filed herein dated August 13, 1936, answers and objects thereto upon the following grounds:

I.

That the proposed plan of rehabilitation, sale, transfer of assets and reinsurance will not pre-

2002 serve the value of the assets of respondent for the benefit of its creditors and policyholders.

II.

That said policyholders' and creditors' rights in the order named are paramount to the claims of stockholders of the corporation; that the equitable rights of said policyholders and particularly said holders of non-cancellable policies is of the very highest order; first, for the reason that the money paid to respondent under and
2003 upon such policies was paid under and pursuant to the highest degree of trust; and, second, that said policyholders have grown older and their rights and privileges are forever gone except as defined and granted under said policies.

III.

That all of the assets of respondent company should be marshaled and impounded for the purpose of preserving and protecting the policyholders' rights and the creditors of said com-
2004 pany; that, if a rehabilitation plan is at all questionable, the assets of said respondent company should be liquidated to the end that the policies issued by said respondent company be reinsured under a substantial and financially able company.

IV.

That the plan proposed will not maintain the continuity of the policyholders' policies; that, while it is fair and correct that the business of

respondent company should be protected and maintained as a going concern, such status is not of the first or of paramount importance.

V.

That he non-cancellable policies now in existence and issued by the said respondent company must be preserved and that the plan proposed seeks to cancel or at least partially destroy said non-cancellable policy rights; that the company proposing to take over the assets under said plan is untried, has no material assets, has no substantial capital and no reserve sufficient to protect the rights of intervenor and said policyholders; that all the facts set forth under the petition herein referred to show that said plan is not feasible or workable and does not provide a plan which will and can protect the interests of the policyholders.

VI.

That, if it be determined that said respondent company is insolvent and cannot be further carried on, that your intervenor is informed and believes and, upon such information and belief, alleges that there are better and bids more fair than made under the proposed plan for the assets and for the privilege of reinsuring the outstanding policies that could be obtained from old and established companies.

VII.

That the proposed plan will give to certain parties inequitable advantages over others.

Wherefore, your intervenor prays that petitioner's prayer for relief, contained in his petition with respect to rehabilitation, etc. and the whole thereof be denied and particularly that the ratification, approval and confirmation of the orders and proceedings heretofore taken herein be denied; that the matter be held in abeyance either in the hands of the present conservator or in the hands of one to be selected by the Court; that a general scheme of financial responsibility be set up preliminary to any bidder making a bid to take over the respondent company and that a feasible plan be first worked out to save and protect the rights and interests of all parties concerned; and for whatever other relief the Court may deem proper.

LEROY ANDERSON and
NEIL S. MCCARTHY,
Attorney for Neil S. McCarthy, Intervenor.

Endorsed: Received copy of the within objection this 20th day of Aug., 1936. U. S. Webb, attorney general; by John L. Flynn, deputy attorney for petitioner.

Filed 3:45 p. m., Aug. 20, 1936. L. E. Lampton, county clerk; by C. H. Holdredge, deputy.

In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, v. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404673.

Return to Order to Show Cause.

Come now Rupert B. Turnbull, William Weisman and Francis Adams, for themselves and for other non-cancellable policyholders similarly situated, and for a return to the respective orders to show cause issued by the court, particularly the order to show cause of August 13, 1936 signed by the Honorable Henry M. Willis, judge of this court, and the order to show cause with respect to rehabilitation, sale and transfer of assets as made by the Honorable Henry M. Willis, judge of this court, on the 14th day of August, 1936, respectfully show:

I.

That they have heretofore petitioned this court and obtained leave of this court by an order duly made, executed and filed, permitting your petitioners to intervene on behalf of themselves and others similarly situated.

II.

That your petitioners and each of them are owners and holders of non-cancellable policies of

2014 insurance in favor of your petitioners and each of them, issued by The Pacific Mutual Life Insurance Company of California, your petitioner Rupert B. Turnbull having had his policy issued to him in September 1922; petitioner William Weisman having had his policy issued to him in 1921, and the petitioner Francis Adams having had his policy issued to him in 1922. Said policies and each of them are in full force and effect and were in full force and effect at the time of
2015 the filing of the petition of Samuel L. Carpenter, Jr. herein for the commencement of this action. That said policies and neither of them have been revoked or cancelled.

III.

Your petitioners allege that there are in excess of forty-nine thousand (49,000) holders of non-cancellable policies situated similarly to your petitioners, and that there are outstanding in excess of forty-nine thousand policies of non-can-
2016 cellable accident insurance issued by the respondent The Pacific Mutual Life Insurance Company of California.

IV.

Your petitioners, for themselves alone and for the persons similarly situated, appear and object to any order ratifying and approving the order of the Honorable Douglas L. Edmonds, judge of this court, made under the date of July 22, 1936, ratifying, approving and confirming the sale and

transfer of the assets of The Pacific Mutual Life Insurance Company of California. Your petitioners object to the ratifying and approving or confirming of the order of the Honorable Douglas L. Edmonds, judge of this court, made under date of July 23, 1936, adopting the sale and transfer of assets and reinsurance agreement as attempted to have been made by the Insurance Commissioner Samuel L. Carpenter, Jr. Object to approving the plan and agreement of rehabilitation and the transfer and sale of assets as proposed by Samuel L. Carpenter, Jr., Insurance Commissioner, and object to the findings of the court heretofore made ex parte that the same is fair and equitable to all interested parties. Object to any order authorizing and ordering the petitioner to execute, as of July 22, 1936, the agreement referred to in the various petitions of Samuel L. Carpenter Jr. as "Exhibit A", being the sale and rehabilitation contract. Object to the ratifying, approving and confirming of the transfer to the new company of the assets of The Pacific Mutual Life Insurance Company of California, the old company. Object to the making of any order approving the terms and conditions under which the contract rights of your petitioners and those similarly situated are destroyed, altered and impaired. Your petitioners allege that on the 22nd day of July, 1936 and on the 23rd day of July, 1936, at the time of

2020 the filing of the respective petitions by the petitioner Samuel L. Carpenter, Jr. as Insurance Commissioner of the State of California, and at the time of the intervention herein by Pacific Mutual Life Insurance Company, at the time of the submission to this court, to-wit, to the Honorable Douglas L. Edmonds, of the petitions for the appointment of a conservator, the application for the appointment of a liquidator, the application for an order to liquidate, the petition with
2021 respect to rehabilitation, sale and transfer of assets, and at the time of the making of the orders on said petitions and each of them by the said Honorable Douglas L. Edmonds, the said Douglas L. Edmonds was disqualified to act, to hear said matters or make any order with respect to the subject matters of the said petitions and with respect to the orders which he did make on the 22nd day of July, 1936 and on the 23rd day of July, 1936 and each of said orders, in this: that
2022 Honorable Douglas L. Edmonds, judge, was the owner and holder of and asserting a claim under a policy of life insurance issued to him prior to the commencement of this proceeding by The Pacific Mutual Life Insurance Company of California, and as such was interested in the subject matter of these proceedings, and was particularly interested in the maintenance of the integrity of his own life insurance policy then and there in force. That when there was presented to the

said Honorable Douglas L. Edmonds, the judge of this court, the proposed plan by which the assets of The Pacific Mutual Life Insurance Company of California were to be transferred to a new corporation, Pacific Mutual Life Insurance Company, under the terms of which, life insurance policies would be reinsured by the new company and protected with all of the reserves created for life insurance policyholders, there was also presented as a part of the plan the express agreement that the new company should not be required to reinsure the forty-nine thousand non-cancellable policyholders, but might accept the full annual premium from such policyholders and scale down the benefits assured by the respective contracts of your petitioners by eighty per cent; that is to say, to pay your petitioners and allow your petitioners only twenty per cent of the benefits contracted to be made and paid to your petitioners in the event of a loss or losses by either or any of them. That then and there Douglas L. Edmonds, whether he was or was not conscious of said situation, was called upon to discriminate in favor of the class of policyholders of which he was one, and against the class to which your petitioners have the disadvantage to belong, to-wit, non-cancellable policyholders. That the said Douglas L. Edmonds was then and there disqualified because he was then and there interested in the subject matter of the proceeding

and in the result which he was then and there about to decide. That the said Douglas L. Edmonds did then and there, whether or not he was then and there actively conscious of the same, discriminate against your petitioners, and did exercise his legal discretion against the rights of your petitioners without notice to your petitioners or either or any of them, without the service of process upon your petitioners or either or any of them, without giving your petitioners their day in court, without giving them an opportunity to be heard, and that your petitioners were not heard. That the orders complained of were made contrary to law and were and are in violation of the rights guaranteed to citizens of the State of California and of the United States by the Fourteenth Amendment to the Constitution of the United States and the Fifth Amendment to the Constitution of the United States, and that said orders deprive your petitioners of their vested rights and of their property without due process of law.

V.

Your petitioners allege that at the time of the making of contracts between themselves and each of them with The Pacific Mutual Life Insurance Company of California, the law existing at said

2029 time protected your petitioners in the enjoyment of the terms of their contracts and each of them, and that thereafter no law could be made or established which impaired the rights of contract of your petitioners and each of them. That the laws under which the petitioner Samuel L. Carpenter, Jr. as Insurance Commissioner, as conservator and as liquidator, attempts to act hereunder, have no force and effect and cannot be
2030 used to impair the rights of the contracts of your petitioners and each of them. That the proposed sale and transfer of assets is unjust and inequitable and deprives your petitioners of their property without due process of law. That the proposed transfer of assets and the sale as already made, is in truth and in fact a transfer of the assets of The Pacific Mutual Life Insurance Company of California to a new corporation offi-
2031 cered and directed by the same financial and personal interests that governed, controlled and wrecked The Pacific Mutual Life Insurance Company of California, and that there has been no actual change in the possession, control or management of the officers, business or assets of the respondent, the old company. That eight of the directors of the old company, The Pacific Mutual Life Insurance Company of California,

2032 are now the directors of the new Pacific Mutual Life Insurance Company. That the same employes, the same agents, the same servants, the same attorneys who acted for and on behalf of the old company are now the servants, agents, employes and attorneys of the new company. That the agencies established by the old company for the sale of policies are now and still are and always have been the agencies which have always
2033 handled the affairs of the old company, and are now operating as agencies for the new company.

VI.

That the non-cancellable policyholders, forty-nine thousand in number, have contributed approximately fourteen million dollars in premiums for the creation of a reserve to pay losses occurring in that class. That several million dollars
2034 remaining of said reserves have been transferred without notice to your petitioners, without affording them their day in court, to the new company. That your petitioners are beneficiaries of said trust fund and have not consented to or been given an opportunity to consent to a change of trustee or a change in the terms of said trust, or a change in the terms of said policies. That the said plan which has been made and which it is

2035 now proposed to again confirm, is confiscatory as to the non-cancellable policyholders, though fair, just and equitable to the life insurance policyholders. That the plan and sale to the new company transfers all of the assets, both those in the reserves and the general assets, real property, good will and other property, to the new corporation Pacific Mutual Life Insurance Company, and deprives the non-
2036 cancellable group of forty-nine thousand persons of their right to participate in those assets.

Wherefore, your petitioners pray that this court may look through the form of said transfer and see and recognize the substance of said plan, and decree that the same is unjust, inequitable and unlawful, and that the court make such order in the premises as will not confiscate
2037 the policies and contracts made and existing between your petitioners and the respondent, and that the court will not as a court of equity lend its aid, directly or indirectly, or through the medium of the Insurance Commissioner of the State of California, to the performance of acts which are unjust and inequitable, and to the performance of an act, to-wit, the breach of contracts which the respondent itself could not

under the terms of its own contracts do and perform; and for such other and further relief as to the court may seem proper.

RUPERT B. TURNBULL.

State of California, County of Los Angeles—ss.

Rupert B. Turnbull, being first duly sworn, deposes and says that he is one of the petitioners in the above entitled matter; that he has read the foregoing return to orders to show cuase, knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

RUPERT B. TURNBULL.

Subscribed and sworn to before me this 19th day of August, 1936.

[Seal] GEO. A. JUDSON.

Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Received copy of the within Return to Order to Show Cause this 19th day of August, 1936. O'Melveny, Tuller & Myers, M. A. T., attorney for Pac. Mutual Life Insurance Company; H. H. Benjamin, Spec. Deputy Ins. Comr., by B. L. Ramsay.

Filed 9:49 a. m. Aug. 20, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

2041 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, v. The Pacific Mutual Life Insurance Company of California, respondent. Pacific Mutual Life Insurance Company, intervenor. No. 404673.

Return of Vernon Bettin and William George Dickinson to Order to Show Cause.

2042 Come now Vernon Bettin and William G. Dickinson, policy holders and persons interested in the above entitled proceedings and file through their attorneys, Bettin, Painter & Wait, this their return to the order to show cause issued by the above entitled court on the 23rd day of July, 1936, and their objections to the proceedings in said cause as follows:

I.

2043 That at all times herein mentioned, objector, Vernon Bettin, was and now is the owner and holder of Non-cancellable Income Policy Number 4661809, issued by The Pacific Mutual Life Insurance Company of California, the respondent above named; that all premiums due upon the policy aforesaid have been paid and said policy is now in full force and effect.

That at all times herein mentioned, objector, William George Dickinson, was and now is the owner and holder of Non-cancellable Income Pol-

2044 icy Number 4642314, issued by The Pacific Mutual Life Insurance Company of California, the respondent above named; that all premiums due upon the policy aforesaid have been paid and said policy is now in full force and effect.

II.

Objectors object to the

a. Confirming and approving and ratifying the permission given with respect to that certain
2045 plan and agreement of rehabilitation, sale and transfer of assets and reinsurance of The Pacific Mutual Life Insurance of California, which said plan and agreement of rehabilitation is referred to in the order to show cause issued herein on the 23rd day of July, 1936, and the carrying out of the terms and provisions thereof;

b. The confirming and approving the action of Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as
2046 liquidator of The Pacific Mutual Life Insurance Company of California, and the action of Pacific Mutual Life Insurance Company, in making, executing and carrying out that certain agreement provided for in said plan and agreement, a copy of which agreement as executed, is attached to the petition referred to in said Order to Show Cause as Exhibit B and that certain amended agreement, a copy of which is attached to said petition as Exhibit D;

2047 c. Confirming and approving the execution and delivery of the Deed and Bill of Sale attached to the petition referred to in said Order to Show Cause as Exhibit C; and the action of said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, and as liquidator of said The Pacific Mutual Life Insurance Company of California, in transferring and setting over to said Pacific Mutual Life Insurance Company, all of the assets of said The
2048 Pacific Mutual Life Insurance Company of California;

d. Each, every and all of the proceedings taken and had up to and including the issuance of said Order to Show Cause on the 23rd day of July, 1936, by the Honorable Douglas L. Edmonds, Judge of the above entitled court:

e. Each, every and all of the proceedings proposed to be taken and had in connection with the
2049 above entitled proceedings.

III.

The objections aforesaid are made upon the following grounds, to-wit:

a. That said permission and order given with respect to said plan and agreement of rehabilitation is unlawful and void for the reason that no hearing of motion for said permission and order was had as required by Section 1016 of the Insurance Code of the State of California;

2050 b. That the proposed plan of rehabilitation is not the best possible plan for the protection of these objectors and other policy holders in The Pacific Mutual Life Insurance Company of California similarly situated;

c. That said plan, if adopted or approved by this court, will render the policy owned and held by these objectors, practically worthless;

d. That said plan undertakes to substitute
2051 some fractional liability by the Pacific Mutual Life Insurance Company for the obligations of The Pacific Mutual Life Insurance Company of California to these objectors;

e. That said plan, if carried out, would constitute a violation of these objectors' rights under Sections 7, 11, 13, 16, 21 and 22 of Article 1 and Section 1 of Article 3, and Section 1 of
2052 Article 12 of the Constitution of the State of California, and also Section 1 of the 14th amendment to the Constitution of the United States of America.

IV.

These objectors object to any plan or scheme which would impair in any manner or way, the obligation of these objectors' contract with The Pacific Mutual Life Insurance Company of California.

2053 V.

These objectors object to all proceedings and orders heretofore or hereafter made by the above entitled court in the above proceeding on the ground that each, every and all of the laws and statutes upon which such proceedings or orders were based, are, and each of them is, unconstitutional and void.

VI.

2054 Objectors object to each, every and all of the orders heretofore made in the above entitled proceeding on the grounds and for the reason that the true facts of the case could not and would not justify the making of said order.

VII.

Objectors hereby refer to the objections heretofore or hereafter filed by all other persons in a 2055 similar situation, and to complaints in intervention heretofore or hereafter filed by persons in a similar situation as these objectors in respect to the above entitled proceedings, and by such reference, hereby adopt the said objections and said complaints in intervention of said persons and incorporates the same herein as a part of this Return.

2056 VIII.

Objectors hereby make demand upon the old Pacific Mutual Life Insurance Company, the new Pacific Mutual Life Insurance Company, and Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, that they and each of them immediately furnish through auditors and appraisers, to be appointed by the court: (1) A complete audit of the business
2057 and affairs of the Pacific Mutual Life Insurance Company covering the last ten years, with particular reference to the stock and other transactions participated in by any director, officer or employee or agent of the company, and (2) a complete appraisement of the assets of the Pacific Mutual Life Insurance Company held by the Insurance Commissioner, this appraisal to be made of the basic assets and not of the stock of
2058 either corporation.

Wherefore, these objectors pray that the objections hereinbefore taken to the proceedings in the above entitled matter be allowed and sustained and that appropriate orders be made by the above entitled court setting aside and vacating each, every and all of the orders heretofore made in the above entitled proceeding and restor-

ing these objectors to the same status that they occupied before said proceedings were instituted.

BETTIN, PAINTER & WAIT,
By VERNON BETTIN,
Attorneys for Objectors.

State of California, County of Los Angeles—ss.

Vernon Bettin and William George Dickinson, being first duly sworn, depose and say: That they are the objectors in the above entitled matter; that they have read the foregoing Return and know the contents thereof; and that the same is true of their own knowledge, except as to the matters which are therein stated upon their information or belief, and as to those matters that they believe it to be true.

VERNON BETTIN,
WILLIAM GEORGE DICKINSON.

Subscribed and sworn to before me this 20th day of August, 1936.

[Seal] GERTRUDE R. KLEIN.
Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed 10:15 a. m., Aug. 20, 1936. L. E. Lampton, county clerk; by Paul F. Rau, deputy.

2062 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, v. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404673.

Return and Answer of Harold S. Cook to Orders to Show Cause Dated August 13,
2063 **1936, and August 14, 1936, Respectively.**

Harold S. Cook, a shareholder of The Pacific Mutual Life Insurance Company of California, for himself, and for and on behalf of all other persons similarly situated who desire to avail themselves of such representation and share the cost thereof, hereby appears in response to the orders to show cause heretofore issued herein on August 13, 1936 and August 14, 1936, respectively, and as cause why the proposed orders
2064 therein specified should not be made alleges and specifies the following, to-wit:

I.

Article 14 of Chapter 1 of Part 2 of the Insurance Code of the State of California, in pursuance and under the authority of which the within proceedings purport to have been and to be taken, is void and unconstitutional in that said Article 14 takes and authorizes the taking of property without due process of law in viol-

2065 tion of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

II.

Said Article 14 is further void and unconstitutional in that it impairs and authorizes a public officer of the state and the courts of the state to impair the obligation of contracts in violation of section 10 of Article I of the Con-
2066 stitution of the United States and of section 16 of Article I of the Constitution of the State of California.

III.

Section 1011 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the tak-
2067 ing of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

IV.

Said section 1011 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Consti-

tution of the United States and of section 16 of Article I of the Constitution of the State of California.

V.

Section 1016 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

VI.

Said section 1016 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

VII.

Section 1017 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amend-

ments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

VIII.

Said section 1017 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

IX.

Section 1020 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

X.

Said section 1020 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

2074 XI.

Section 1021 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution
2075 of the State of California.

XII.

Said section 1021 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XIII.

2076 Section 1037 of said Insurance Code, and each separate subdivision or paragraph thereof, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

2077

XIV.

Said section 1037, and each separate subdivision and paragraph thereof is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

2078

XV.

Section 1043 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of
2079 section 13 of Article I of the Constitution of the State of California.

XVI.

Said section 1043 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XVII.

Section 1045 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

XVIII.

Said section 1045 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XIX.

Section 1046 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

2083 XX.

Said section 1046 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XXI.

2084 Section 1047 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution
2085 of the State of California.

XXII.

Said section 1047 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

2086 XXIII.

Section 1048 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the
2087 State of California.

XXIV.

Said section 1048 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

2088 XXV.

Section 1049 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

2089 XXVI.

Said section 1049 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XXVII.

2090 Section 1050 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

2091 XXVIII.

Said section 1050 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

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XXIX.

2092 Section 1051 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution
2093 of the State of California.

XXX.

Said section 1051 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

2094

XXXI.

Section 1052 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

2095 XXXII.

Said section 1052 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XXXIII.

2096 Section 1053 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

2097 XXXIV.

Said section 1053 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

2098 XXXV.

Section 1054 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the
2099 State of California.

XXXVI.

Said Section 1054 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

2100 XXXVII.

Section 1058 of said Insurance Code, in pursuance and under the authority of which the within proceedings, or some of them, purport to have been and to be taken, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

2101 XXXVIII.

Said section 1058 is further void and unconstitutional in that it impairs, and authorizes a public officer of the state and the courts of the state to impair, the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XXXIX.

2102 The proceedings had and taken by the Insurance Commissioner and by the within court herein are void and unconstitutional in that they deny and have denied due process of law to the shareholders of said The Pacific Mutual Life Insurance Company of California, in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State
2103 of California.

XL.

Said proceedings hereinabove in paragraph XXXIX referred to are further void and unconstitutional in that they impair and have impaired the obligation of the contracts of said shareholders in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

2104 XLI.

The purported order appointing conservator made and entered herein on July 22, 1936, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law, in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of Section 13 of Article I of the Constitution of the State of California.

XLII.

2105 Said purported order is further void and unconstitutional in that it impairs and authorizes the impairment of the obligation of the contracts of said shareholders, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XLIII.

The purported order of liquidation made and 2106 entered herein on July 22, 1936, is void and unconstitutional in that it takes and authorizes the taking of property without due process of law, in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of Section 13 of Article I of the Constitution of the State of California.

XLIV.

Said purported order of liquidation is further void and unconstitutional in that it impairs and authorizes the impairment of the obligation of

2107 the contracts of said shareholders, in violation of section 10 of Article I of the Constitution of the United States and of Section 16 of Article I of the Constitution of the State of California.

XLV.

The purported order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of The Pacific Mutual Life Insurance Company of California is void and unconstitutional in that it
2108 takes and authorizes the taking of property without due process of law, in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of Section 13 of Article I of the Constitution of the State of California.

XLVI.

Said purported order hereinbefore in paragraph XLV referred to is further void and unconstitutional in that it impairs and authorizes
2109 the impairment of the obligation of the contracts of said shareholders, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XLVII.

The purported order approving amendment of rehabilitation, sale and transfer of assets and reinsurance agreement made and entered herein on July 23, 1936, is void and unconstitutional in that

2110 it takes and authorizes the taking of property without due process of law, in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State of California.

XLVIII.

Said purported order hereinabove in paragraph XLVII referred to is further void and unconstitutional in that it impairs and authorizes the im-
2111 pairment of the obligation of the contracts of said shareholders, in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

XLIX.

The acts and proceedings of said Insurance Commissioner in proposing, agreeing to, executing and procuring the approval of the purported
2112 Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement referred to in the order to show cause herein were and are, and each of them was and is, void and unconstitutional in that they deprive and have deprived the shareholders of said The Pacific Mutual Life Insurance Company of California of their property without due process of law, in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the State

of California; and further in that they impair and have impaired the obligation of the contracts of said shareholders in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the State of California.

L.

The proceedings had and taken herein were and are void, irregular, arbitrary and without authority in law, in that:

(a) No notice of any of said proceedings, or of the application for, or the making of, any of the orders hereinabove referred to was given to any of the shareholders of The Pacific Mutual Life Insurance Company of California;

(b) None of said shareholders was given the right or opportunity to appear and be heard in respect of the action taken and/or proposed to be taken by the said Insurance Commissioner and/or by the within court;

(c) None of said shareholders was given the right or opportunity to appear and be heard in respect of the making, execution and/or approval of said purported Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement referred to in the order to show cause herein;

(d) None of said shareholders was given the right or opportunity to secure, attempt to secure, present and/or propose other and different plans or agreements of rehabilitation, reinsurance, sale and transfer of assets or reorganization;

(e) The order approving the Purported Rehabilitation, Sale and Transfer of Assets and Reinsurance referred to in the order to show cause herein, and the order approving Amendment thereto, were and each was made improvidently, without a full or any hearing, without notice or opportunity for hearing to any of the shareholders, and without the presentation and consideration of such independent and impartial appraisals, information and data as would have enabled the court to form a considered and informed judgment upon the merits of said purported Plan and Agreement;

(f) The said Insurance Commissioner was and is without authority in law to sell, transfer or otherwise dispose of all or substantially all of the assets of said The Pacific Mutual Life Insurance Company of California without the approval and consent of shareholders owning at least a majority of the outstanding capital stock of said company, and without notice and opportunity for a hearing in respect thereof being given the said shareholders;

(g) The within court was and is without power or jurisdiction to order or approve, confirm or ratify the sale, transfer or other disposition of all or substantially all of the assets of said company without notice or opportunity for a hearing in respect thereof having been given the shareholders of said company;

(h) The said Insurance Commissioner was and is without any authority or power in law to make or execute said purported Rehabilitation, sale and Transfer of Assets and Reinsurance Plan and Agreement referred to in the order to show cause herein, and the within court was and is without power or jurisdiction to order or approve, confirm or ratify said plan and agreement;

(i) The said Insurance Commissioner has no right, power or authority in law to use all or any part of the assets of said The Pacific Mutual Life Insurance Company of California to purchase stock in any other corporation, firm or concern;

(j) As the respondent hereby appearing is informed and believes and therefore alleges, said The Pacific Mutual Life Insurance Company of California at the time of any of the proceedings had and taken by said Insurance Commissioner and the within court, was not insolvent or in such condition that its further transaction of business would have been hazardous to its policyholders, or creditors, or to the public; and the finding and determination of said Insurance Commissioner to the contrary were and are arbitrary and capricious and not founded or based on fact;

(k) As respondent hereby appearing is informed and believes and therefore alleges, the

finding and determination of said Insurance Commissioner to the effect that he will be unable to restore the business, affairs and property of said The Pacific Mutual Life Insurance Company of California to such a position that it will be able to carry on its business as heretofore, maintain its necessary reserves and discharge in full its obligations to policyholders and others as they mature, that further efforts to proceed under section 1011 of the Insurance Code would be futile and not to the best interests of its policyholders, creditors, stockholders and the public generally, and that the interests of such persons would be best served by granting an order of liquidation, were and are arbitrary and capricious, unfounded in fact and made without any independent or impartial data or information to support them and without any attempt by said Insurance Commissioner to manage, operate or conduct the business and affairs of said company as conservator and without any attempt by such actual operation to determine whether conservation could be effected and liquidation avoided;

(l) The finding of the within court in accordance with the finding and determination of the Insurance Commissioner hereinabove in subdivision (k) referred to, was and is without support in any evidence, data or information before the court;

2125 (m) The finding numbered "1" in the Order Permitting, Approving and Authorizing Rehabilitation, etc., was and is without support in any evidence, data or information before the court and is contrary to the facts;

(n) The finding numbered "2" in said order was and is without support in any evidence, data or information before the court and is contrary to the facts;

(o) The finding numbered "3" in said order
2126 was and is without support in any evidence, data or information before the court and is contrary to the facts;

(p) The finding numbered "4" in said order was and is without any support in any evidence, data or information before the court and is contrary to the facts;

(q) The finding contained in the Order Approving Amendment of Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement
2127 is without support in any evidence, data or information before the court and is contrary to the facts;

(r) As the respondent hereby appearing is informed and believes and therefore alleges, the within proceedings are but an incident in and a part of a preconceived plan and design on the part of the directors of said The Pacific Mutual Life Insurance Company of California, acting in concert and collaboration with said Insurance Commissioner, to convey and transfer all of the

2128 assets of said company to a new corporation for the purposes of eliminating the interest therein of the shareholders of the original company, and of defrauding, hindering, and delaying certain creditors and preferring others.

LI.

Said purported Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement referred to in the order to show cause herein and the purported amendment thereof, are
2129 unfair and inequitable and in violation of the rights of the shareholders, among others, of said The Pacific Mutual Life Insurance Company of California, in the following particulars, among others, and in each of them, to-wit:

(a) All or substantially all of the assets of the said company (hereinafter referred to as the "Old Company") are transferred to the so-called "New Company", but neither non-cancellable policyholders, creditors, nor shareholders partici-
2130 pate or are to participate in the realization from any but a small part of said assets;

(b) The New Company does not assume all of the liabilities of the Old Company, but it acquires all of the latter's assets;

(c) The purported agreement for restoration of benefits to non-cancellable policyholders is illusory, unfair and inequitable in that: 1. Such restoration is to be made only at such time or times, and in such manner and to such an extent as may be proposed by the New Company

and approved by the Insurance Commissioner, so that the agreement may never be performed and could never be enforced; 2. The fund out of which said restoration, if any, is to be made is unduly limited to the net profits derived by the New Company from that portion of the non-participating branch of its life department represented by non-participating life insurance policies reinsured and assumed, whereas such policyholders, and thereafter the shareholders, should have the benefit of all profits made by the New Company from all assets transferred to, and all insurance reinsured and assumed by, the New Company;

(d) The assets of the Old Company are taken over at their admitted values as of December 31, 1935, whereas said assets are in fact of a value considerably in excess thereof by reason of the conservative appraisal of admitted values, and the general appreciation in values since December 31, 1935. Any realization by reason of such appreciation in excess of admitted values is reserved to the New Company and shareholders do not participate therein or obtain the benefit thereof;

(e) The provision for payments to the Old Company, in which non-cancellable policyholders and thereafter shareholders participate, is unduly limited to payments out of the net profits derived by the New Company from that portion of the non-participating branch of its life insurance

policies reinsured and assumed, whereas such policyholders, and thereafter the shareholders, should have at least the benefit of all profits made by the New Company from all assets transferred to, and all insurance reinsured and assumed by, the New Company;

(f) The limited sources to which payments to be made for the benefit of shareholders are limited, are uncertain in nature and may very probably soon cease to exist because of: 1. The lapse and discontinuance of non-participating policies reinsured and assumed by the New Company; 2. The conversion of the reinsured and assumed non-participating policies into participating policies; 3. The limitations on the use, and deductions from, the fund so created by virtue of the provisions requiring establishment of reserves for any depreciation in the assets, and the restoration of certain sums to the surplus of the participating department, and the retention by the New Company of the benefit of reserves freed by a lapsation of non-cancellable policies in excess of a lapse rate of ten per cent (10%) per year;

(g) The name, good-will and agency structure of the Old Company are transferred to the New Company, but nothing is paid in respect thereof and there is no provision for participation by the shareholders in the new business acquired or profits made by the New Company as

2137 the result of the acquisition and use of these assets;

(h) The assumption by the New Company of claims against the Old Company is unfairly and unduly limited to aggregate admitted value of the transferred assets as of December 31, 1935, thereby adopting a low value and depriving the shareholders of the benefit of any appreciation in such value;

(i) The agreement by the Insurance Com-
2138 missioner as to the manner in which he will vote the stock of the New Company in the future in respect of a proposed voluntary mutualization is contrary to public policy and void;

(j) The purchase price to be paid for the stock of the New Company held by the Insurance Commissioner in the event of a voluntary mutualization is not devoted, in proper order, for the benefit of the shareholders of the Old Company; on the contrary, any surplus after pay-
2139 ment of claims against the Old Company is to be repaid to the New Company;

(k) The proposed Plan and Agreement is uncertain, vague and ambiguous in many particulars so that its intent and meaning cannot be determined;

(l) The shareholders, who had no part in the negotiation, drafting or preparation of said Plan and Agreement and who are objecting to its terms and provisions, are nevertheless bound, in the event of any dispute, by the decision of one

2140 of the parties to it and apparently without recourse to the courts;

(m) The provision making the agreement a complete and adequate defense to any action by the shareholders, is unfair, contrary to public policy, and destructive of the right to have disputes and controversies thereunder and rights affected thereby adjudicated by the courts;

(n) The provision for the creation of a fund based on the amount of assumed and reinsured 2141 non-participating insurance in force at the time of creation is illusory and unfair in that there is no limitation on the time within which the fund may be created, and the basis upon which the amount of said fund is to be computed may never exist because of the lapse and discontinuance and maturity of non-participating policies and their conversion into participating policies, either by agreement with individual policyholders or by voluntary mutualization;

2142 (o) The consideration agreed to be paid by the New Company to the Old Company for the latter's assets is grossly inadequate and less than the fair value of said assets.

LII.

The within court is without jurisdiction of the subject-matter of these proceedings.

LIII.

The purported order appointing conservator made and entered herein on August 11, 1936, is void, illegal and without any authority in law for

each and all of the reasons hereinabove specified in respect of purported order appointing conservator dated July 22, 1936.

LIV.

The orders heretofore made herein on July 22, 1936 and July 23, 1936 now sought to be ratified and approved, were and are, and each of them was and is, further void in that the judge of the within court who made and signed said orders was disqualified in that he was at the time of the making of said orders the owner and holder of a participating life insurance policy in The Pacific Mutual Life Insurance Company of California, which said fact has been declared in open court.

Wherefore, respondent hereby appearing respectfully prays, on his behalf and on behalf of all persons similarly situated, that all proceedings heretofore had herein be vacated and set aside, that said purported Plan and Agreement be not approved, confirmed or ratified, or that in the alternative, said Plan and Agreement be amended and modified so as to make it fair and equitable, and for such other and further relief as to the court may seem proper

LOEB, WALKER AND LOEB,
By HERMAN F. SELVIN,
Attorneys for Harold S. Cook.

Verified.

Endorsed: Filed 10:09 a. m. Aug. 20, 1936. L. E. Lampton, county clerk; Paul F. Rau, deputy.

2146 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent, Pacific Mutual Life Insurance Company, a corporation, intervenor. No. 404,673.

Response of George I. Cochran, W. H. Davis,
2147 **Douglas E. C. Moore and Stanley M. McClung to Petition for Intervention and for Order to Show Cause of Pacific Mutual Life Insurance Company, a Corporation, Intervenor, and Order to Show Cause Issued by Honorable Douglas L. Edmonds in the Above Entitled Matter on July 23, 1936.**

Come now George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung,
2148 and respectfully represent and allege:

I.

That continuously since a long time prior to the year 1920 and prior to the enactment of the law as set forth in sections 1010 to 1061, inclusive, of the Insurance Code of California, each of the undersigned was, and is, the holder of a substantial number of shares of stock in and the holder of a policy of life insurance in respondent corporation.

2149 II.

That continuously throughout the time aforesaid, each of the undersigned has been the holder and owner of a policy of life insurance issued by said respondent, which policy of life insurance has been, throughout said time, and is now, in full force and effect.

III.

That each of the undersigned is one of the persons interested in this proceeding, described 2150 and referred to in paragraph V of said petition for intervention.

IV.

That each of the undersigned is now, and has been from a time long prior to July 22, 1936, a director of the respondent corporation.

V.

That on the 22nd day of July, 1936, and for a long time prior thereto, and continuously since 2151 said date, A. N. Kemp and Asa V. Call were also directors of said respondent corporation.

VI.

That said A. N. Kemp and Asa V. Call are now, and have been since its incorporation, directors of said intervenor.

VII.

That prior to said 22nd day of July, 1936, said A. N. Kemp, Asa V. Call and other persons whose names are to the undersigned unknown,

2152 in cooperation with said Commissioner, caused to be prepared all, each and every of the applications, petitions and orders referred to in said petition for intervention and the plan and agreement referred to in said petition, together with the form for conveyance from said petitioner to said intervenor referred to in said petition for intervention.

VIII.

That the preparation of each and all of the
2153 papers aforesaid was secret and without the knowledge of the undersigned or either of them and, as the undersigned are informed and believe and therefore state the fact to be, without the knowledge of a majority of the directors of said respondent.

IX.

That on said 22nd day of July, 1936, all, each and every of the applications, petitions and orders (except the petition and order dated July
2154 23, 1936), together with said plan and agreement, were practically simultaneously presented and submitted to Honorable Douglas L. Edmonds, judge of the above entitled court, in the above entitled matter, and each, every and all of said orders, except said order dated July 23, 1936, were at said time signed by said Honorable Douglas L. Edmonds, judge as aforesaid.

X.

That said Asa V. Call was, on said 22nd day of July, 1936, and for a long time prior thereto

2155 had been, attorney for said respondent, and at said time was, and on and continuously since said July 22, 1936, has been, and is now, the attorney also for said intervenor.

XI.

That reference is hereby made to the various petitions, applications, plan and agreement referred to in said petition for intervention and on file in the above entitled matter, for further particulars.

2156

XII.

That on said 22nd day of July, 1936, and for a long time prior thereto, said Honorable Douglas L. Edmonds was, and he still is, the holder of a life insurance policy issued by respondent, which policy was throughout all of said times and is in full force and effect, and said Honorable Douglas L. Edmonds was and is one of the persons financially interested in this proceeding and in the affairs of said respondent, described 2157 in paragraph V of said petition in intervention and in paragraph III of said order to show cause.

That by reason of his said interest in this proceeding, as aforesaid, said Douglas L. Edmonds was not on said 22nd day of July, 1936, or at any time thereafter, and is not now, qualified to sit or act in the above entitled proceeding, and was and is forbidden by section 170 of the Code of Civil Procedure of the state of California to sit or act therein.

2158 XIII.

That said Honorable Douglas L. Edmonds has heretofore filed in the above entitled proceeding statement and declaration and caused a memorandum thereof to be entered in the minutes of the above entitled court of his interest in said proceeding and in said respondent, as aforesaid.

XIV.

That said Honorable Douglas L. Edmonds is not, and was not at the time of making either
2159 or any of the orders referred to in said petition for intervention, qualified to sit or act as judge in the above entitled matter, and that all, each and every of the orders made and signed by him as such judge in the above entitled matter was and is null, void and of no effect.

XV.

Upon such information as was in possession of responding parties, they believe that respondent company was not insolvent nor in such a
2160 condition that its further transaction of business would or will be hazardous to its policyholders, creditors, or the public; and upon such information and belief deny the allegations in paragraph IV of said application for order appointing conservator.

XVI.

That, as the undersigned are informed and believe and therefore state the fact to be, an interval of time of only a few moments elapsed

2161 between the making of said order appointing conservator of said respondent insurance company above referred to and the time of the making of said order for liquidation by said Honorable Douglas L. Edmonds, as aforesaid; that nothing was done by said conservator and no business was carried on by him as such prior to the making of said order for liquidation and no investigation was made by said petitioner for the purpose of ascertaining whether efforts to
2162 proceed under and pursuant to said order appointing conservator, as aforesaid, would be futile, and said petitioner, without any such investigation, forthwith applied for said order to liquidate and wind up the business of said respondent insurance company; that no full or other hearing whatsoever was had upon the application of said petitioner for order to liquidate, nor was any policyholder or stockholder of said insurance company notified thereof; on the contrary,
2163 said order was made without any effort by said petitioner to proceed as such conservator pursuant to the provisions of section 1011 of the Insurance Code of the state of California, or otherwise, or to ascertain or determine whether efforts to proceed under said section would be futile.

XVII.

That all insurance policies and business, except so-called non-cancellable contracts of insurance, and all of the property and assets of said

2164 respondent, with certain minor exceptions, have been by said petitioner turned over and delivered to said corporation known as and called "Pacific Mutual Life Insurance Company", and petitioner has thereby rendered himself incapable of carrying out and administering the trusts imposed upon him as Insurance Commissioner of the State of California.

XVIII.

The undersigned respectfully represent and
2165 show that the agreement under and pursaunt to which said assets were turned over and delivered to said Pacific Mutual Life Insurance Company, and the plan of which said agreement was and is a part, are unfair and inequitable, and in their operation have the effect of depriving and will deprive each holder of a life insurance policy issued by said respondent, and each stockholder of said respondent of property without due process of law, and deny to each such
2166 policyholder and each such stockholder the equal protection of the law, in the following particulars:

Said petitioner is, by section 1057 of the Insurance Code of the state of California, "trustee for the benefit of all creditors and all other persons interested in the estate of" said respondent insurance company.

That each and every policyholder is, and all other persons interested as creditors, stockholders

2167 or otherwise in said respondent are, interested and concerned in the integrity and maintenance of its property and assets and the general and equal availability thereof to the payment and satisfaction of all claims against said respondent.

That each and every stockholder of said corporation is interested in the property of said respondent insurance company remaining after the satisfaction of the claims of its creditors and policyholders.

2168 XIX.

That the life insurance policies issued by said respondent, referred to in paragraph V of said petition for intervention, are, as the undersigned are informed and believe and therefore state the fact to be, of the intrinsic value of upwards of fifteen dollars ($15.00) per thousand dollars ($1,000.00) of such life insurance, and that the total value of said insurance policies is many millions of dollars;

2169 That no consideration whatever has been paid or is intended to be paid by said intervenor for said insurance policies under and pursuant to the plan and agreement referred to in said petition for intervention, and neither said respondent nor any creditor or stockholder of said respondent will derive any benefit whatever from the value of said insurance policies.

XX.

That in and by said plan and agreement all of the property and assets belonging to said

2170 respondent and all consideration received by said petitioner for said property and assets are, and have been, so disposed of as to render the same and the whole thereof unavailable to either said respondent company or to policyholders, stockholders or any other persons interested therein.

XXI.

That in and by said plan and agreement and the conduct of the petitioner pursuant thereto, all of the assets of respondent have been dis-
2171 posed of at a valuation fixed as of December 1, 1935, which valuation is grossly and materially less than the value of said property and assets on the 22nd day of July, 1936, and does not include any value for the goodwill or agency structure of said respondent insurance company; that said goodwill and agency structure are assets of great value.

XXII.

2172 That by said orders referred to in said petition for intervention and the operation thereof said respondent and all creditors, policyholders, stockholders and other persons interested in said respondent and in the trusts under and pursuant to which said petitioner was acting, have been without notice or hearing or any opportunity for notice or hearing whatever deprived of their property without due or any process of law whatever.

2173 XXIII.

That in and by said orders and the things done by said petitioner thereunder, the contracts of holders of all insurance policies issued by said respondent are modified and impaired without the consent of the parties to said contracts and policies and without any notice or hearing or opportunity to be heard with reference thereto.

XXIV.

That the holders of so-called non-participat-
2174 ing policies of insurance issued by respondent have been by said orders and the acts of said petitioner thereunder deprived of access to or the availability of any of the property and assets of said respondent conveyed and delivered by petitioner to said intervenor, and deprived of access to or the availability of any consideration received by said petitioner or agreed to be paid by said intervenor for said property and assets, for the payment or satisfaction of the
2175 claim of any such non-cancellable policyholder against said respondent or against said petitioner.

XXV.

That the transfer of property and assets of said respondent to said intervenor by said petitioner includes "cash and securities" deposited "by said respondent with any governmental authority as a condition to the conduct of its business"; that said cash and securities so deposited by respondent includes large sums of money and

2176 securities of great value, amounting in all to several millions of dollars, all of which has been turned over to said intervenor without consideration, and of which the persons for whom said petitioner is trustee and particularly the holders of non-cancellable policies and stockholders of respondent have been deprived by said conveyance, and will continue to be deprived if the latter is maintained in effect.

2177 XXVI.

That under and pursuant to said plan and agreement non-cancellable policyholders and stockholders of respondent will be deprived of all right to the three million dollars paid by petitioner to said intervenor, to the property or any thereof turned over by said petitioner to said intervenor, or to the stock of intervenor delivered to said petitioner.

2178 XXVII.

That said orders and the acts and agreements of petitioner and intervenor responsive and pursuant thereto are inequitable, unfair and confiscatory of the property of policyholders and stockholders of said respondent, and deprive each such stockholder and each such policyholder of his, her or its property without due or any process whatever, and impair the obligations of the re-

2179 spective contracts of each such stockholder and policyholder, in violation of the Constitution of the United States and the Constitution of the state of California, and deny to the holders of non-cancellable policies issued by said respondent and stockholders of said respondent the equal protection of the law.

XXVIII.

These respondents hereby refer to and make
2180 a part hereof, to the same extent as if here set forth in full, their response filed concurrently herewith to the order to show cause issued August 13, 1936.

Wherefore, these respondents respectfully pray as follows:

1. For an order cancelling, vacating, setting aside and holding for naught each, every and
2181 all of the orders made by said Honorable Douglas L. Edmonds in this proceeding, and any and all things done pursuant to said orders and each thereof;

2. For an order directing and commanding said intervenor to return to said petitioner said three million dollars ($3,000,000) in cash and to return and reconvey to said petitioner all property and assets of every kind, character and

2182 description transferred to said intervenor by said petitioner;

3. For an order directing said petitioner to investigate and report to this court the facts concerning the present value of all assets and property of respondent on July 22, 1936, and the value of all outstanding life insurance policies and business of said respondent, including the goodwill and agency structure of said respond-
2183 ent, and the amount and present value of all of the deposits of money and/or securities made by said respondent with insurance authorities in the various states and other governments within whose jurisdiction said respondent carried on and transacted life and other insurance business, and as to the availability of said cash and other securities so deposited and as to the availability of said cash and other securities so de-
2184 posited for the benefit of the trusts of which said petitioner is trustee;

4. For an order directing said petitioner to call for propositions and plans to be submitted to this court for protecting all of the holders of policies of insurance of every kind issued by said respondent and all claimants and all creditors and stockholders of said respondent, and all other persons interested in said trust;

2185 5. That the prayer of said petition in intervention be denied;

6. That a hearing be had as to whether the ground for order appointing conservator and restraining order existed or now exists, and that said order appointing conservator and restraining order made July 22, 1936, be discontinued, and that respondent be authorized and directed to resume title and possession of property and
2186 the conduct of its business;

7. For such other and further order as may be meet in the premises and protect the interests of all parties concerned herein.

OSCAR LAWLER,

HAROLD JUDSON,

Attorneys for George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung.

2187 Verified.

Endorsed: Received copy of the within return this 20 day of Aug., 1936. Webb, Atty. Gen., by Flynn, deputy.

Filed Aug. 20, 1936, 12:19 p. m. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

2188 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404,673.

Response of George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M.
2189 **McClung, to Order to Show Cause Issued in the Above Entitled Matter on August 13, 1936, Why Order to Liquidate Should Not Be Made.**

Come now George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung, and respectfully represent and allege:

I.

That each of said persons last above named
2190 is now, and at all of the times herein mentioned has been, the owner of a substantial number of shares of the capital stock of said respondent insurance company.

II.

That each of said persons last above named is now, and at all of the times herein mentioned has been, the owner and holder of a policy of life insurance issued by said respondent, which policy is in full force and effect.

2191

III.

That on or about the 22nd day of July, 1936, there was filed by the above named petitioner application for order appointing conservator of said insurance company; that at the time of the filing of said application, the same was immediately presented to the Honorable Douglas L. Edmonds, judge of the above entitled court, who thereupon made and entered said order appointing conservator, and restraining order;

2192

IV.

That coincident with the filing of said application for and the making of said order appointing conservator and said restraining order, petitioner also filed application for order to liquidate said respondent insurance company, which was also immediately presented to said the Honorable Douglas L. Edmonds, judge of the above entitled court, who thereupon immediately made and entered an order of liquidation of said insurance company;

2193

V.

That at the same time and coincident with the filing of said applications for and the making of said orders appointing conservator and of liquidation above referred to, petitioner also filed and presented to said the Honorable Douglas L. Edmonds, judge thereof, petition for order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan

2194 and agreement relating to the affairs of said insurance company, which application was also forthwith presented to said Honorable Douglas L. Edmonds, judge of said court, who at the same time made and entered an order permitting, approving and authorizing rehabilitation, sale and transfer of assets and said reinsurance plan and said agreement;

V-a.

That on July 23rd, 1936, petitioner presented
2195 to said Honorable Douglas L. Edmonds, judge as aforesaid, petition for approval of agreement as modified and amended, and said Honorable Douglas L. Edmonds made an order approving said agreement as modified and amended.

V-b.

That neither said respondent nor any stockholder, policyholder, creditor or other person interested in respondent or its property or assets, or otherwise, was informed, notified, or had any
2196 opportunity to be heard or was heard with reference to said agreement as amended.

VI.

That the only persons present before said judge other than the officers of said court and said two witnesses, were the petitioner, the Honorable John L. Flynn, deputy attorney general of the state of California, representing said petitioner, and Asa V. Call, Esquire, the latter stating that he appeared on behalf of respondent;

2197 VI-a.

That said Asa V. Call was, on and prior to said 22nd day of July, 1936, a director and counsel for respondent; that he was not authorized to appear for or to consent on behalf of respondent to the making of said agreement or the order of liquidation or the order of rehabilitation.

VII.

That the presentation of all, each and every
2198 of said applications and petitions and the making of said respective orders were coincident; that no notice of the presentation or intention to present any of said applications or petitions was given to either any creditor, policyholder, or stockholder of said insurance company, nor was any "hearing" had with reference to any of said applications or orders.

VIII.

2199 That there were on said 22nd and 23rd days of July, 1936, and at all times prior thereto, and now are, upwards of 2800 stockholders of said The Pacific Mutual Life Insurance Company of California, and there were more than 250,000 policies of insurance issued by said insurance company outstanding and in force, and that the life insurance policies of said insurance company then outstanding and in force were upwards of 200,000 in number and aggregating upwards of $600,000,000 in amount.

2200 VIII-a.

That continuously since a long time prior to the year 1920 and prior to the enactment of the law as set forth in sections 1010 to 1061, inclusive, of the Insurance Code of California, each of the undersigned was, and continuously since has been a stockholder in, and the holder of a policy of life insurance issued by, said respondent.

IX.

2201 That heretofore and on the 11th day of August, 1936, in the course of the above entitled proceeding, said Honorable Douglas L. Edmonds, judge as aforesaid, made declaration and filed memorandum that he was at the time of the filing of said respective applications and petitions and the making of said orders above referred to, the holder of a life insurance policy issued by said respondent insurance company, which policy was at said times and all thereof in full
2202 force and effect.

X.

That, as the undersigned are informed and believe and therefore state the fact to be, the facts so stated by said Honorable Douglas L. Edmonds in said declaration were and are correct.

XI.

That by reason of the holding of said life insurance policy by said Douglas L. Edmonds, as aforesaid, he was and is interested in said

2203 proceeding and disqualified to sit or act therein and disqualified and without authority to make either or any of the orders above referred to, and, that said orders were and are and each thereof was and is void and of no effect.

XI-a.

Upon such information as was in possession of responding parties they believe that respondent company was not insolvent nor in such a condition that its further transaction of business
2204 would or will be hazardous to its policyholders, creditors or the public; and upon such information and belief deny the allegations in paragraph II of said application for order to liquidate.

XII.

That, notwithstanding the invalidity and ineffectiveness of said orders, said petitioner heretofore, and on the 22nd day of July, 1936, acting pursuant to said order permitting, approving and
2205 authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement above referred to, caused a corporation to be organized under the laws of the state of California and under the name, "Pacific Mutual Life Insurance Company", had issued to himself all of the stock thereof, and turned over to said corporation from the assets of respondent the sum of $3,000,000.00 and all of the remaining property and assets of said respondent above named, on the 23rd day of July, 1936, and said Pacific Mutual

Life Insurance Company retains possession and control of said money and property.

XIII.

That, as the undersigned are informed and believe, and, therefore, state the fact to be, an interval of time of only a few moments elapsed between the making of said order appointing conservator of said respondent insurance company above referred to and the time of the making of said order for liquidation by said the Honorable Douglas L. Edmonds, as aforesaid; that nothing was done by said conservator and no business was carried on by him as such prior to the making of said order for liquidation and no investigation was made by said petitioner for the purpose of ascertaining whether efforts to proceed under and pursuant to said order appointing conservator, as aforesaid, would be futile, and said petitioner, without any such investigation, forthwith applied for said order to liquidate and wind up the business of said respondent insurance company; that no full or other hearing whatsoever was had upon the application of said petitioner for order to liquidate, nor was any policy holder or stockholder of said insurance company notified thereof; on the contrary, said order was made without any effort by said petitioner to proceed as such conservator pursuant to the provisions of section 1011 of the Insurance Code of the State of California, or otherwise, or to ascertain or determine

whether efforts to proceed under said section would be futile.

XIV.

That all insurance policies and business, except so-called non-cancellable contracts of insurance, and all of the property and assets of said respondent, with certain minor exceptions, have been by said petitioner turned over and delivered to said corporation known as and called "Pacific Mutual Life Insurance Company," and petitioner has thereby rendered himself incapable of carrying out and administering the trusts imposed upon him as Insurance Commissioner of the State of California.

XV.

The undersigned respectfully represent and show that the agreement under and pursuant to which said assets were turned over and delivered to said Pacific Mutual Life Insurance Company, and the plan of which said agreement was and is a part, are unfair and inequitable, and in their operation have the effect of depriving and will deprive each holder of a life-insurance policy issued by said respondent, and each stockholder of said respondent of property without due process of law, and deny to each such policy holder and each such stockholder the equal protection of the law, in the following particulars:

Said petitioner is, by section 1057 of the Insurance Code of the state of California, "trustee

2212 for the benefit of all creditors and all other persons interested in the estate of" said respondent insurance company.

That each and every policy holder is, and all other persons interested as creditors, stockholders or otherwise in said respondent are, interested and concerned in the integrity and maintenance of its property and assets and the general and equal availability thereof to the payment and satisfaction of all claims against said respondent.

2213 That each and every stockholder of said corporation is interested in the property of said respondent insurance company remaining after the satisfaction of the claims of its creditors and policy holders.

XVI.

That in and by said so-called rehabilitation plan of said petitioner and said agreement, referred to in the application for an said order to show cause dated August 13, 1936, said petitioner

2214 proposes to organize a new corporation (such a corporation having been already organized as aforesaid) and to turn over to said corporation all of the assets of said respondent insurance company, with certain minor exceptions, (said property having been already turned over to said corporation, intervenor herein) and that said new company shall assume only some of the obligations of said respondent insurance company and the assets of the latter will be available to the

2215 payment and satisfaction of only a part of its creditors and policy holders, to the exclusion of other creditors and policy holders and others interested in said respondent. That said plan and agreement further provide that said new company shall at a later date be mutualized and upon such mutualization said new company shall repurchase its own stock theretofore issued to petitioner, and that the price paid upon such repurchase of said stock shall be used, so far as 2216 necessary, to pay claims against said respondent insurance company, payment of which had theretofore been assumed by said new company, and that so far as the amount of said price is not necessary for the latter purpose, it shall be repaid to said new company.

That said plan and agreement further provide that the life-insurance policies of said respondent insurance company now outstanding shall be assumed and reinsured by said new company;

2217 That said life insurance now outstanding is a valuable asset of said respondent insurance company; that said new company is not required to pay, and has not paid, and does not intend to pay anything therefor, and that policy holders, stockholders and other persons interested and for whom said petitioner is as such conservator, trustee, will thereby be deprived of said value and of any opportunity to participate therein.

That as such conservator petitioner became and is trustee for all creditors, policy holders, stockholders and other persons interested in the estate of said respondent; that petitioner has caused to be organized a corporation named Pacific Mutual Life Insurance Company, to which he has turned over and delivered three million dollars ($3,000,000.00) in cash and substantially all other property and effects belonging to said respondent and has received from said Pacific Mutual Life Insurance Company in purported consideration of said three million dollars and property and effects, ten thousand (10,000) shares of the capital stock of said Pacific Mutual Life Insurance Company of the par value of one hundred dollars ($100.00) per share, and the assumption by said Pacific Mutual Life Insurance Company of certain claims against said respondent; said petitioner has, however, agreed to sell back to said Pacific Mutual Life Insurance Company said ten thousand shares at a price unstated, to pay with the price so received said claims, payment of which had been assumed by said Pacific Mutual Life Insurance Company as aforesaid, and to return to said Pacific Mutual Life Insurance Company all of said purchase price not required for the payment of such claims; that by means of said transfer of money and assets to said Pacific Mutual Life Insurance Company all policy holders of the respondent company will be deprived of the property and assets so trans-

2221 ferred to said Pacific Mutual Life Insurance Company as aforesaid and to said stock or any avails thereof for the payment of their claims or any of them;

That by said order and the acts and conduct of said petitioner pursuant thereto, all of the property and assets belonging to said respondent and all consideration received by said petitioner for said property and assets have been so disposed of as to render the same unavailable to
2222 either said respondent company or its policy holders, stockholders or any other persons interested.

That in and by said order and the acts and conduct of said petitioner pursuant thereto all of the assets of respondent have been disposed of at a valuation fixed as of December 1, 1935, which valuation was grossly and materially less than the value of such property and assets on the 22nd day of July, 1936, and did not include
2223 any value for the goodwill or agency structure of said respondent insurance company.

That by said order and the operation thereof said respondent and all creditors, policy holders, stockholders and other persons interested in said respondent and in the trust under and pursuant to which said petitioner was acting have been, without notice or hearing or any opportunity for notice or hearing whatsoever, deprived of their property without due or any process of law whatsoever.

2224 That in and by said order and the things done by said petitioner thereunder the contracts of holders of all insurance policies issued by said respondent are modified and impaired without any notice or hearing or opportunity to be heard with reference thereto.

That the holders of so-called nonparticipating policies of insurance issued by said respondent have been by said order and the acts of said
2225 petitioner thereunder deprived of access to or the availability of any of the property and assets delivered by said petitioner to said Pacific Mutual Life Insurance Company and of access to or the availability of any consideration received by said petitioner for said property and assets for the payment or satisfaction of the claim of any such noncancellable policy against said respondent or against said petitioner.

2226 That the transfer of property and assets of said respondent to said Pacific Mutual Life Insurance Company pursuant to said order includes "cash or securities deposited" by said respondent "with any governmental authority as a condition to the conduct of its business," which represent a large sum of money from which the persons interested in said trust and for whom said petitioner is trustee will by said order and the acts

2227 of petitioner thereunder, be deprived of any benefit whatever.

That in and by said order and the operation thereof reinsurance by said Pacific Mutual Life Insurance Company and assumption by it with reference to so-called non-cancellable policies issued by said respondent is limited to certain specified fractional parts of the liability now expressed in said noncancellable policies, and then
2228 only to the extent of a value of the assets and property of said respondent fixed by some unknown person as of December 31, 1935, and the holders of said noncancellable policies will be and are thereby, in common with all policyholders and creditors, deprived of the right to look to the entire property and assets of said respondent for the satisfaction of the claims arising out of their said contracts.

2229 That said order and the acts and agreements of said petitioner responsive and pursuant thereto are inequitable, unfair to and confiscatory of the property of policy holders and stockholders of said respondent and deprive each such stockholder and each such policy holder of his, her or its property without due or any process whatever and impair the obligations of the respective contracts of each such stockholder and policy

2230 holder in violation of the Constitution of the United States and the Constitution of the State of California, and deny to the holders of non-cancellable policies issued by respondent the equal protection of the law.

Wherefore, these respondents respectfully pray as follows:

1. For an order cancelling, vacating, setting aside and holding for naught said order of liqui-
2231 dation made by said Honorable Douglas L. Edmonds on the 22nd day of July, 1936, and any and all things done pursuant thereto;

2. For an order vacating, cancelling, setting aside and holding for naught the order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement made by Honorable Douglas L. Edmonds on July 22, 1936, and any and all things
2232 done under said order and/or said agreement;

3. For an order vacating, cancelling, setting aside and holding for naught the order approving amendment of rehabilitation, sale and transfer of assets and reinsurance agreement, made by Honorable Douglas L. Edmonds on July 23, 1936;

4. For an order vacating, cancelling, setting aside and holding for naught order permitting

2233 intervention by Pacific Mutual Life Insurance Company and order to show cause made by said Honorable Douglas L. Edmonds July 23, 1936;

5. For an order directing and commanding said Pacific Mutual Life Insurance Company to return to said petitioner said $3,000,000.00 in cash, and to reconvey to said petitioner all property and assets of every kind, character and description transferred to said Pacific Mutual Life
2234 Insurance Company by said petitioner;

6. For an order directing said petitioner to investigate and report to this court the facts concerning the present value of all assets and property of respondent on July 22, 1936, and of the outstanding life-insurance policies in force of said respondent and of the prospects of a sale of all or any part of said property and policies; directing said petitioner to investigate and report
2235 to the court the amount and present value of all deposits of money and/or securities made by said respondent with the insurance authorities in the various states and other governments within whose jurisdiction said respondent was carrying on and transacting a life and other insurance business and as to the availability of said cash and other securities for the benefit of the trust of which said petitioner is trustee;

2236 7. For an order directing said petitioner to call for propositions and plans for protecting all of the holders of policies of insurance of every kind issued by and of the rights of all other persons interested in said respondent;

8. That the prayer of the petition filed herein by said Pacific Mutual Life Insurance Company, intervenor, on July 23, 1936, be denied;

9. That a hearing be had as to whether the grounds for the order appointing conservator and
2237 restraining order existed or now exist and that said order appointing conservator and restraining order made July 22, 1936, be discontinued and that respondent be authorized and directed to resume title and possession of its property and the conduct of its business.

10. For such other and further order as may protect the interests of all parties concerned herein.

OSCAR LAWLER & HAROLD JUDSON,
2238 *Attorneys for George I. Cochran, W. H. Davis, Douglas E. C. Moore, and Stanley M. McClung.*

Verified.

Endorsed: Received copy of the within return this 20 day of Aug., 1936. Webb, Atty. Gen. By Flynn.

Filed Aug. 20, 1936, 12:19 p. m. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

2239 In the Superior Court of the State of California in and for the County of Los Angeles.

Harold S. Cook, for himself and on behalf of all persons similarly situated, plaintiff, vs. Samuel L. Carpenter, Jr., as Insurance Commissioner of the state of California, and as Conservator and Liquidator of The Pacific Mutual Life Insurance Company of California, The Pacific Mutual Life Insurance Company of California, a corporation, and Pacific Mutual Life Insurance
2240 Company, a corporation, defendants. No.

Complaint

(To vacate and set aside proceedings and orders in conservation and liquidation).

Plaintiff above-named, for himself and for and on behalf of all other persons similarly situated, complains of the above-named defendants as follows:

I.

2241 At all times herein mentioned Samuel L. Carpenter, Jr., has been and now is the duly appointed, qualified and acting Insurance Commissioner of the state of California. Said defendant is hereinafter sometimes referred to as the "Commissioner."

II.

At all times herein mentioned The Pacific Mutual Life Insurance Company of California has been and now is a corporation organized and

existing under and by virtue of the laws of the state of California, and at all said times to July 22, 1936, said corporation has been actively engaged in the life, health and accident insurance and annuity business in the state of California and elsewhere throughout the United States. Said corporation is hereinafter sometimes referred to as the "Old Company."

III.

At all times herein mentioned since about July 22, 1936, Pacific Mutual Life Insurance Company has been and now is a corporation organized and existing under and by virtue of the laws of the state of California. Said corporation is hereinafter sometimes referred to as the "New Company."

IV.

At all times herein mentioned plaintiff Harold S. Cook has been and now is a shareholder of the Old Company, being the owner during all that time of not less than four hundred six (406) shares of the capital stock of said corporation.

V.

On or about August 3, 1936, plaintiff and Allan C. Balch, Ferdinand R. Bain, Shannon Crandall and H. H. Wagenseller associated themselves together as a Protective Committee of the Stockholders of The Pacific Mutual Life Insurance Company of California for the purpose of acting and appearing for and on behalf,

and representing the interests, of such shareholders of such Old Company as desired to avail themselves of such representation in connection with the proceedings in respect of the liquidation of said company hereinafter referred to. Thereafter numerous shareholders of said Old Company authorized, and numerous other shareholders are from time to time authorizing, said persons to act as their attorney-in-fact to take such steps as they might deem advisable to investigate the so-called rehabilitation, sale and transfer of assets and reinsurance agreement, referred to in said proceedings, and to protect their interests as shareholders of said Old Company, and in that connection to take such proceedings in court or otherwise, either in the name of said shareholders or in the name of others, as said committee might deem advisable. A true and correct copy of the form of written authorization which has been and is being executed by said shareholders is attached hereto, marked "Exhibit A" and by this reference made a part hereof as though fully set forth. In this connection plaintiff alleges that at noon on August 10, 1936, shareholders owning approximately fifty thousand (50,000) shares of the capital stock of said Old Company had authorized said committee to act for them in accordance with the terms of said Exhibit A.

VI.

2248 By reason of the facts hereinabove alleged plaintiff appears herein for himself and for and on behalf of all of the shareholders hereinabove in paragraph V referred to and for and on behalf of all other shareholders of said Old Company who may hereafter authorize him and/or said Protective Committee to act for them. In this connection plaintiff alleges further that the number of said shareholders is large and that it 2249 would be and is impracticable to bring them all before the court but that the questions herein involved are common to all of them. For that reason plaintiff sues and appears herein for the benefit, and for and on behalf, of all of said shareholders and of all other shareholders who may desire to avail themselves of such representation and agree to share the expense thereof.

VII.

On or about July 22, 1936, the Commissioner, 2250 acting or purporting to act in his official capacity, filed in the within court an application for an order of said court appointing him Conservator of said Old Company and thereafter, on the same day, an order of said court was made and entered under and by virtue of the terms of which said Commissioner was appointed Conservator of said Old Company and of its business, assets and affairs, and said Commissioner was ordered to take possession forthwith of all the books, records, property and assets of said Old Com-

2251 pany and as Conservator to conduct its business for the benefit of its policyholders, creditors and stockholders and of the public in general. The proceedings in which the foregoing order was made, and in which the various orders, applications and petitions hereinafter referred to were made, are entitled, "Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner, vs. The Pacific Mutual Life Insurance Company of California, Respondent,"
2252 and are numbered 404673 in the records of this court.

VIII.

On July 22, 1936, and concurrently with the filing of the application for appointment of Conservator hereinabove in paragraph VII referred to, said Commissioner filed in the within court an application for an order to liquidate said Old Company, and thereafter and on the same day an order of said court was made and en-
2253 tered under and by virtue of the terms of which said Commissioner was appointed Liquidator of the assets and business of said Old Company, all of the right, title and interest of said Old Company in and to its assets and property was vested and confirmed in said Commissioner as Liquidator, and said Commissioner as Liquidator was ordered to conduct, manage and operate the business of said Old Company, to wind up and liquidate its business, and to formulate, prepare and submit forthwith if possible for the

approval of said court a plan and agreement of reinsurance and rehabilitation or sale and transfer of assets.

IX.

On July 22, 1936, and concurrently with the filing of the applications hereinabove in paragraphs VII and VIII referred to, said Commissioner filed in the within court a petition for an order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement of said Old Company and thereafter, and on the same day, an order of said court was made and entered approving said proposed plan and agreement, ordering said Commissioner forthwith to organize a new corporation and to subscribe to its capital stock by the use of funds and assets under his control as Liquidator of said Old Company, authorizing him forthwith to execute an agreement in form substantially as set forth in said plan, ordering said Commissioner forthwith to transfer and set over to said New Company all of the assets of the Old Company, except the stock of said New Company and except any claims which the Old Company might have against any of its present or past officers, directors or employees or against any other person by reason of wrongful or illegal acts or omissions of any of such past or present officers, directors or employees, authorizing and ordering said Commissioner to do any and all things necessary, desira-

ble or proper to carry out the terms of said plan and agreement, and directing the officers, directors, agents and employees of the Old Company to co-operate with and assist said Commissioner and the New Company in the effectuation of said plan by the execution of such documents and the doing of such acts in connection therewith as might be requested of them by said Commissioner. A copy of said plan and agreement is attached to the petition for approval thereof on file in said proceedings and by this reference the same is incorporated in this complaint as though fully set forth.

X.

On July 23, 1936, said Commissioner filed in the within court a petition for approval of an amendment to said plan and agreement and thereafter on the same day said court made and entered its order approving said amendment. A copy of said amendment is attached to said petition for an order approving the same on file in said proceedings, and by this reference it is incorporated herein as though fully set forth.

XI.

Immediately upon the making of the orders hereinabove referred to said Commissioner and the New Company executed said plan and agreement and thereupon all of the assets of the Old Company, with the exceptions hereinabove referred to, were transferred and conveyed to the

2260 New Company and ever since that time said New Company has been and now is in the sole and exclusive possession thereof and said company has been and now is conducting the insurance and annuity business heretofore conducted by the Old Company. Under and by virtue of the terms of said plan and agreement said Commissioner sold, granted, bargained, assigned, conveyed, transferred, set over and delivered to the New Company all the assets of the Old
2261 Company excepting only the stock and claims hereinabove in paragraph IX referred to, and said New Company agreed to assume and reinsure the liability of the Old Company under all policies and contracts of insurance outstanding and in force on July 22, 1936, excepting, however, that such assumption and reinsurance in respect of the non-cancellable, health and accident disability insurance policies theretofore issued by the Old Company were limited to cer-
2262 tain specified portions, ranging from twenty per cent (20%) to ninety per cent (90%), of the Old Company's liability on or under said non-cancellable policies, and said New Company agreed, at such time or times and in such manner and to such an extent as it and the Commissioner might select, to restore full benefits under said non-cancellable policies but only to the extent of the New Company's net profits derived from a limited portion of the business of the Old Company taken over by it, to-wit: the net

profits derived by the New Company from that portion of the business of its accident and health department represented by accident and health policies reinsured under said agreement and the net profits derived by the New Company from that portion of the business of the non-participating branch of its life department represented by non-participating life insurance policies reinsured under said agreement; and said New Company further agreed for a period of ten (10) years commencing January 1, 1937, to pay to the Commissioner its net profits derived from the foregoing sources after deductions for the restoration of benefits hereinabove referred to and after various reserves considerably in excess of one million seven hundred ninety thousand dollars ($1,790,000.00) should have been established for the benefit of the New Company, and said New Company further agreed at the end of said ten-year period either to create a fund of ten dollars ($10.00) per one thousand dollars ($1,000.00) of reinsured non-participating life insurance then in force, or to pay interest at the rate of six per cent (6%) per annum on an amount equal to such fund until it should have been created, to be applied first, to the restoration of benefits and establishment of reserves hereinabove referred to, second, to the payment of claims against the Commissioner, and third, to distribution pro rata to the shareholders of the Old Company. Except as herein-

2266 above expressly alleged, no payments are or are agreed to be made to, or for the benefit of the shareholders of the Old Company. In this connection plaintiff is informed and believes that the greater part of the earnings and profits of the Old Company were derived, and those of the New Company will be derived, from sources other than those allocated as aforesaid to the making of said payments.

XII.

2267 Plaintiff is informed and believes and therefore alleges that all of the orders hereinabove in paragraphs VII, VIII and IX referred to were made concurrently and contemporaneously and without the lapse of any time other than the time required for the signing thereof; that no hearing or other proceeding in connection therewith was had by or before the within court and that no evidence in connection therewith was presented to or heard by said court other than
2268 the allegations of the various applications and petitions hereinabove referred to. Plaintiff is further informed and believes and therefore alleges that at no time prior to or concurrently with the making of said orders, or prior to or concurrently with the making of the order hereinabove in paragraph X referred to, was there presented to the within court, nor did the court have, any impartial or independent appraisals, data or information upon which to base a con-

sideration and determination of the fairness, equity and legality of the proceedings herein taken and/or of said plan and agreement.

XIII.

At no time prior to or concurrently with the making of any of said orders was any notice thereof or of the proceedings for the procurement thereof given to any shareholder of the Old Company nor was any such shareholder ever given any right or opportunity to appear and be heard in or in connection with said proceedings and/or the making of said orders, or any of them. The consent of the shareholders of the Old Company to said proceedings has never been requested or obtained nor has the consent of said shareholders or any of them to the aforesaid transfer and conveyance of assets ever been requested or obtained. In this connection plaintiff alleges that the assets so transferred and conveyed to the New Company were and are substantially all of the assets of the Old Company and were all of the assets of said Old Company which at that time were being or theretofore had been used in the conduct and operation of the business of said Old Company.

XIV.

Plaintiff is informed and believes and therefore alleges that at some time prior to July 22, 1936, the exact date being unknown to him, the directors of the Old Company, or some of them,

2272 acting in concert and collaboration with said Commissioner, formed a plan or design to eliminate the interests of the shareholders of the Old Company in its assets and business, to create a new corporation which would take over and conduct and operate the assets and business of the Old Company and thereby to hinder, delay and defraud certain of the policyholders and creditors of said Old Company of their claims, whereas other policyholders and creditors of said Old
2273 Company would be preferred in the collection and satisfaction of their claims; and agreed that in order to accomplish said plan and design proceedings substantially such as those which have been hereinabove alleged should be taken for the purpose of accomplishing said transfer of assets, delay and hindrance of some creditors and preference of others, and elimination of the interests of the shareholders of the Old Company. Plaintiff is further informed and believes and
2274 therefore alleges that the proceedings had and taken as aforesaid were and are but incidents in and a part of said preconceived plan and design.

XV.

Plaintiff is informed and believes and therefore alleges that the various findings and determinations of said Commissioner as to the condition of the Old Company and the necessity for taking the various proceedings hereinabove alleged to have been taken were arbitrary and capricious

and not supported by the facts in that said Old Company was not at any of the times said proceedings were taken insolvent or in such condition that its further transaction of business would have been hazardous to its policyholders or creditors or to the public. Plaintiff is further informed and believes and therefore alleges that the finding and determination of said Commissioner that further efforts to proceed under section 1011 of the Insurance Code would be futile and not to the best interests of its policyholders, creditors, stockholders and the public generally and that the interests of such persons would be best served by granting an order of liquidation, were and are arbitrary and capricious, unfounded in fact, and made without any independent and impartial data or information to support and without any attempt by said Commissioner to manage, operate or conduct the business and affairs of said Old Company as Conservator and without any attempt on his part by such actual operation to determine whether conservation could be affected and liquidation avoided.

XVI.

Plaintiff further alleges that said purported rehabilitation, sale and transfer of assets and reinsurance plan and agreement was and is unfair and inequitable and in violation and disregard of the rights of the shareholders of said Old Company in that said plan does not pre-

2278 serve to said shareholders the full benefit of their interest in the assets and business of said Old Company remaining after the just claims of all policyholders and creditors have been paid and satisfied, but on the contrary transfers and reserves for the benefit of said New Company substantially all of the interest remaining in the assets and business of the Old Company after allowance for the claims of policyholders and creditors; and further in that the consideration
2279 agreed to be paid by the New Company for the Old Company's assets and business is grossly inadequate and substantially less than the fair value of said assets. Said plan and agreement is further unfair and inequitable and in violation and disregard of the rights of the shareholders of said Old Company in that, as plaintiff is informed and believes and therefore alleges, no attempts were made prior to the consummation of said plan and agreement to obtain any offers
2280 from others for the purchase of said assets and business or reinsurance of the policyholders of the Old Company or rehabilitation of the Old Company.

XVII.

By reason of the foregoing facts and proceedings had and taken, and the orders made and entered herein, are and each of them is void, irregular, arbitrary and without authority in law, and said proceedings and orders are and each of them is void and unconstitutional in

that they deprive and have deprived the shareholders of said Old Company of their property without due process of law in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the state of California, and further in that they impair and have impaired the obligation of the contracts of said shareholders in violation of section 10 of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the state of California.

XVIII.

Further by reason of the foregoing facts plaintiff alleges that the statute under and in pursuance of which the said proceedings and orders purport to have been taken and made, being Article 14 of Chapter 1 of Part 2 of the Insurance Code of the state of California, is void and unconstitutional in so far as it authorizes and permits such proceedings and orders, in that it deprives plaintiff and the persons on whose behalf he sues of their property without due process of law, in violation of section 1 of Article XIV of Amendments to the Constitution of the United States and of section 13 of Article I of the Constitution of the state of California, and further in that it impairs and authorizes the impairment of the obligation of the contracts of said persons and parties in violation of section 10

of Article I of the Constitution of the United States and of section 16 of Article I of the Constitution of the state of California.

XIX.

Plaintiff, and the persons on whose behalf he sues, have been and will be irreparably injured by said proceedings and orders in that, by the consummation and enforcement of the plan and agreement approved and permitted thereby, their entire interest as shareholders in and to the business and assets of the Old Company has been and will be destroyed. Plaintiff and the persons on whose behalf he sues have no adequate remedy at law or in the proceedings herein referred to in that, as plaintiff is informed and believes and therefore alleges, any intervention in said proceedings may be subordinated, as a matter of law, to the proceedings had and orders made prior to such intervention.

Wherefore, plaintiff, for himself and for and on behalf of all other persons similarly situated, prays for a judgment and decree vacating, setting aside and annulling all proceedings had and taken and all orders heretofore made in said action No. 404673, for plaintiff's costs incurred herein, including a reasonable attorneys' fee, and for such other and further relief as to the court may seem proper.

LOEB, WALKER AND LOEB,
By.....,
Attorneys for Plaintiff.

287 EXHIBIT A.

Protective Committee of Stockholders of
The Pacific Mutual Life Insurance Company of
California,
Room 717 I. N. Van Nuys Building,
210 West Seventh Street,
Los Angeles, California.

Gentlemen:

288 I am the owner of.....shares of stock of The Pacific Mutual Life Insurance Company of California.

In response to your letter dated August 3, 1936, signed by Messrs. Allan C. Balch, Ferdinand R. Bain, Harold S. Cook, Shannon Crandall and H. H. Wagenseller as a Protective Committee of the Stockholders of The Pacific Mutual Life Insurance Company of California,
289 hereinafter referred to as the "old company", I hereby designate and appoint as my attorney-in-fact the said committee as it now is or from time to time may be constituted, to take such steps as it may deem advisable to investigate the so-called "Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement" with Pacific Mutual Life Insurance Company, hereinafter referred to as the "new company", and to protect my interests as a stockholder of the old company.

2290 Without limiting the effect of the foregoing general language, I hereby authorize my said attorney-in-fact to employ legal counsel and such other persons as in its judgment may be necessary, to conduct negotiations in my behalf and to protect my said interests by proceedings in court or otherwise, either in my name or in its name or in the name of others, all in such manner as the committee, in the exercise of its dis-
2291 cretion, may deem advisable, but the committee shall not, for me, approve any agreement for the rehabilitation and/or liquidation of the old company or any agreement for the sale and transfer of its assets or any agreement for the mutualization of the old company or of the new company or any agreement of reinsurance, without my prior approval.

I agree that the committee shall consist of the
2292 persons named above and of such other persons as they may select to act with them either in addition to or to replace any such persons, that the committee will formulate its own rules of procedure and rules for the addition, removal and/or substitution of its members, and that the members of the committee will serve without compensation. I understand that the committee will act for other stockholders of the old com-

pany as well as for myself and since it will act without compensation I agree that it will have no liability to me except in the event of its own gross negligence.

I further agree to pay a pro rata proportion of the expenses incurred by the committee based upon the number of shares owned by me in relation to the whole number of shares of stock represented by the committee under similar powers of attorney, but subject to the express limitation that in no event, except with my express written consent, shall the expense to me, including attorneys' fees, exceed ten (10) cents for each share of stock owned by me.

Dated at ....., ..., 1936.

.....

(Signature of Stockholder)

Please Print Name and Address Below.

.....

Address:.....

(Street and Number)

.....

(City) (State)

Telephone Number:.....

Verified.

Endorsed: Filed Aug. 24, 1936 at 10:30 a. m. L. E. Lampton, county clerk; by A. G. Stanham, deputy.

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2296 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of California, petitioner, v. Pacific Mutual Life Insurance Company of California, a corporation, respondent.

Edwin Janss, Harold Janss, Gordon B. Kaufmann, Andrew Blackmore, Clifton B. Herd, Fred H. Oliver, intervenors. No. 404-673.

2297 **Complaint in Intervention.**

Intervenors above named, on their own behalf and on behalf of other persons similarly situated, by leave of court first obtained, file this, their cause in intervention, and allege as follows, to-wit:

I.

That at all times herein mentioned your intervenors herein have had and now have an interest 2298 in the above entitled cause by reason of their several ownership of policies of insurance heretofore issued to each of them by Pacific Mutual Life Insurance Company of California, a corporation.

II.

That at all times herein mentioned the Pacific Mutual Life Insurance Company of California was and is a corporation duly organized and existing under the laws of the state of California.

and has had and still has its principal place of business in the city of Los Angeles, county of Los Angeles, state of California.

III.

That at all times herein mentioned Pacific Mutual Life Insurance Company was and now is a corporation incorporated under the laws of the state of California, with its principal place of business in the city of Los Angeles, county of Los Angeles, state of California.

IV.

That Samuel L. Carpenter, Jr., is the duly appointed, qualified and acting Insurance Commissioner of the State of California.

V.

That on or about the 22d day of July, 1936, the Insurance Commissioner of the State of California filed in this court an application for an order appointing him conservator of the Pacific Mutual Life Insurance Company of California, a corporation, which order was duly made and entered, under and by virtue of the terms of which said petitioner was appointed conservator of said Pacific Mutual Life Insurance Company of California, a corporation, and of its business assets and affairs, and said Insurance Commissioner was ordered to take possession forthwith of all books, records, property and assets of the said company, and as conservator to conduct its business for the benefit of its policy holders,

creditors and stockholders, and of the public in general.

VI.

That on or about July 22, 1936, the above entitled court, upon the application of the said Insurance Commissioner of the State of California, this court made certain orders affecting the Pacific Mutual Life Insurance Company of California, a corporation, its books, records, property, policy holders, creditors and stockholders, and the public in general, and granted to the said Insurance Commissioner of the State of California certain powers and prescribed certain duties in connection therewith. That on or about the said 22d day of July, 1936, certain plans for the rehabilitation of the Pacific Mutual Life Insurance Company of California, a corporation, were approved by this court, and the Insurance Commissioner was authorized to organize a new company designated Pacific Mutual Life Insurance Company, a corporation, under and by virtue of which the assets, with certain exceptions, of Pacific Mutual Life Insurance Company of California, a corporation, were conveyed and transferred to Pacific Mutual Life Insurance Company, a corporation. That the details of the said transactions are con-

2305 tained in the pleadings of petitioner and respondent in the above matter, and are made a part hereof by reference as though set forth in full and verbatim.

VIII.

That by complaints in intervention, and otherwise, it appears that other persons have heretofore complained and alleged that the acts of the Insurance Commissioner of the State of Cali-
2306 fornia, with respect to rehabilitation and sale and transfer of assets and reinsurance plans and agreements, were and are unfair and inimical to the best interests of such intervenors, and likewise inimical and unfair to the policy holders, shareholders and creditors of Pacific Mutual Life Insurance Company of California, a corporation.

IX.

2307 Your present intervenors allege that the formation and preparation of a rehabilitation and reinsurance plan and agreement as affecting Pacific Mutual Life Insurance Company of California, a corporation, and its successor in interest, the instrumentality of the Insurance Commissioner, as conservator, in accomplishing a plan of rehabilitation appear essentially and in substance to be equitable and fair, considering

all of the problems involved, and having in mind the best interests of all persons concerned.

X.

These present intervenors further allege that while it probably is true that the plan of rehabilitation and reinsurance heretofore submitted by the Insurance Commissioner of the State of California, and which is now the subject matter of an order to show cause pending before this Honorable Court, can in some respects be altered and modified so as to settle and determine questions not as yet settled and determined in the plan thus far submitted, and while it may be true that in some respects the "plan" can be altered and modified in particulars which will enhance its fairness and equitability to all persons concerned, these present intervenors nevertheless believe that in the main the plan is a good one, intelligently and honestly conceived and formulated for the purpose of accomplishing the greatest good for the greatest number of persons concerned and the public at large. These present intervenors further take the position that the acts and things heretofore accomplished by the Insurance Commissioner of the State of California, as such Commissioner and conservator of Pacific Mutual Life Insurance Company of Cali-

fornia, a corporation, and the acts and things done by the above entitled court with respect of the appointment of said Insurance Commissioner as conservator and in connection thereafter with his acts as such conservator, were lawful and constitutional, and that the statutory provisions authorizing and governing all such acts of this court, and the conservator, were and are constitutional.

XI.

That the rehabilitation plan and reinsurance agreement hereinabove referred to is at present on file in the records of this court in this action, and is made a part hereof by reference as though set forth in full and verbatim.

Wherefore, these present intervenors pray that the rehabilitation and reinsurance plan and agreement submitted by the Insurance Commissioner of the State of California be authorized and approved by this court, and be modified and amended to the extent and within such limits as will more effectually accomplish the following purposes:

(a) The preservation of the value of the assets of the estate for the benefit of its creditors and policy holders;

(b) The protection, as far as possible, of all of the existing legal rights of all interested parties in the assets of Pacific Mutual Life Insur-

2314 ance Company of California, a corporation, and its instrumentalities and successors in interest;

(c) The protection of the right of policy holders to maintain, in so far as may be possible, the continuity of their insurance policies;

(d) The protection and enablement of the established business created by Pacific Mutual Life Insurance Company of California, a corporation, to be maintained as a going concern;

(e) The attainment of solvency of the corpo-
2315 ration in which policies may be insured by avoiding the primary cause of alleged insolvency or the protection against insolvency of the corporation in which policies may be reinsured by avoiding such primary cause of alleged insolvency, namely, the writing of non-cancellable, disability and life policies on such a basis that the losses and required reserves cannot be paid or maintained;

(f) For such other and further relief as to
2316 the court may seem just and meet in the premises.

WM. M. RAINS,
Attorneys for Above Named Intervenors.

Verified.

Endorsed: Received copy of the within complaint this 20th day of August, 1936. ....., attorney for .....

Filed Aug. 24, 1936, 3:40 p. m. L. E. Lampton, county clerk; by J. MacGregor, deputy.

CLERK'S COPY.

Vol. III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON AND ALFRED F. MACDONALD, PETITIONERS,

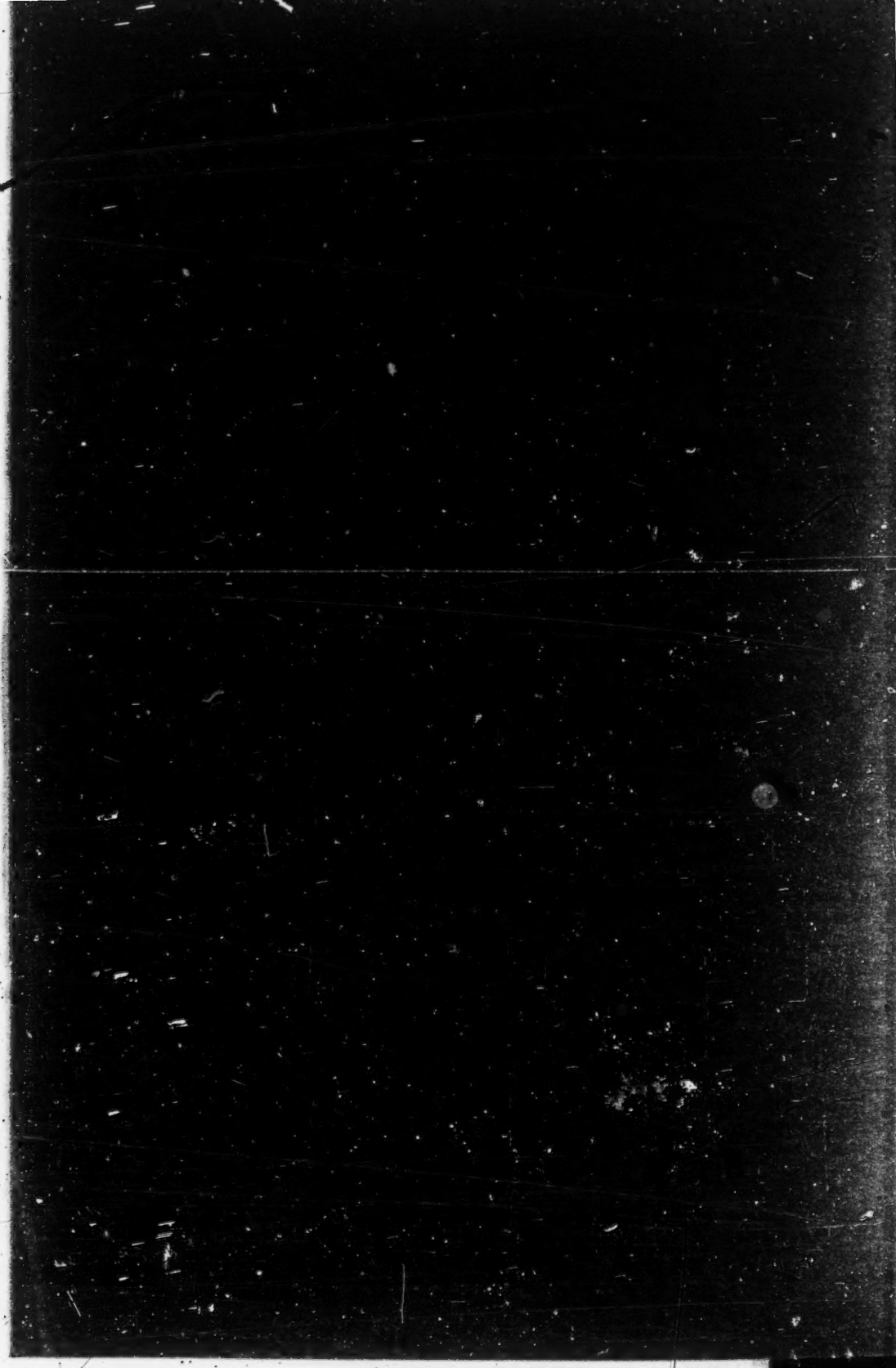
vs.

SAMUEL L. CARPENTER, JR., INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED APRIL 2, 1938.

CERTIORARI GRANTED MAY 16, 1938.



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A. A. CARMICHAEL,
Montgomery, Alabama,
Attorney for Respondents J. Parker Evans, on Behalf of Himself and All Other Holders of Active Life Non-Cancellable Income Policies Issued in the State of Alabama Who May Wish to Join With Him in the Proceeding.

2317 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404,673.

Answer of Interveners to Petition and Order to Show Cause.

2318 Come now the interveners, Marshall D. Hall and Joseph C. McManus, on behalf of themselves and of all holders of non-cancellable income policies and for answer to the petition of, petiverified August 14, 1936
tioner with respect to rehabilitation, sale and transfer of assets and reinsurance plan and agreement on file herein, deny and allege as follows:

I.

2319 Answering paragraphs II, III, IV, V, VI, VII, VIII, IX and X of petitioner's petition, these interveners have not sufficient information or belief upon the subject to enable them to answer the same, and placing their denial on that ground, deny each and every allegation therein contained; except that these interveners admit that the paper writings referred to in said paragraphs were executed and the orders referred to in said paragraphs were made.

2320 As a first defense, these interveners allege:

II.

That the order of July 22, 1936 permitting and approving and authorizing rehabilitation and more fully described in paragraph V of the petition and the order of July 23, 1936 ordering the approval of the amendment of the rehabilitation sale and transfer of assets and reinsurance agreement have both been vacated by this court as being void orders and hence the agreement is
2321 entirely void.

As a further, second and separate defense, these interveners allege:

III.

Upon information and belief that the Pacific Mutual Life Insurance Company of California mingled all of its assets for many years and there was no way in which a court could determine which of the assets were held as reserve for the
2322 life insurance policy holders and which of the assets were held as reserve for the non-cancellable income policy holders.

IV.

Upon information and belief that it was only very recently that an attempt was made to segregate these reserves and that they were still intermingled and that any attempt to segregate them was a mere matter of bookkeeping and no actual and legal segregation of assets was made.

2323 V.

Upon information and belief that all of the reserves were so intermingled that it is impossible for this court to property or legally segregate them and that the life policy holders had no lien upon any of the assets of the company which were superior or different from the lien of the non-cancellable income policy holders and that the entire assets of the company constitute a trust fund for its creditors.

2324 VI.

Upon information and belief that if this company is declared insolvent as is prayed for in the petition that thereupon and immediately every holder of a life insurance policy and every holder of a non-cancellable income policy becomes a creditor of the company and ceases to be a policy holder, and his only right thereafter is to appear as a creditor of the company and to file a claim for the damages which he can prove for 2325 the breach of the contract made by the insurance company.

VII.

That in that event every life insurance policy holder and every holder of non-cancellable income policies is entitled to an equal pro-rata share of its assets according to the amount of damages which he can prove.

VIII.

That the fact that as alleged in the petition and in other petitions on file with this court that

2326 the life insurance contracts were profitable contracts to the company and the non-cancellable income policies were unprofitable contracts to the company is entirely immaterial and that every creditor is entitled to his pro-rata share of the assets of the company regardless of whether the company, before its insolvency, happened to have a profitable or unprofitable contract with him.

As a further, third and separate defense, these interveners allege:

2327 IX.

That the said alleged rehabilitation agreement is not a rehabilitation agreement for the following reasons:

(1) It does not rehabilitate the Pacific Mutual Life Insurance Company of California, which remains insolvent.

(2) It does not follow the statute which prescribes the method of rehabilitating a company.

2328 (3) The agreement was made in advance of a full hearing before the court and is hence void under the statute.

(4) That it is entirely contrary to public policy and to the laws of the state of California to permit the Insurance Commissioner to be the sole stockholder of a rehabilitated insurance company and, on the contrary, the policy of the state, as declared by its statutory enactments, is to divorce any control by the Insurance Commis-

2329 sioner over a rehabilitated company except as to the approval of its investments.

(5) That the new corporation, so called under the agreement, should be under the control of its directors under the laws of the state of California, and not under the control or supervision of the Insurance Commissioner, which is contrary to the public policy and to the declared statutory policy of the state of California, and is contrary to the statute.

2330 (6) That the said agreement is not a reinsurance agreement in any sense of the word as it provides for a novation.

(7) That the said agreement is a plain reorganization agreement, and as such is an attempt by the Insurance Commissioner to substitute for the judgment of the interested parties and the court, the judgment of the Insurance Commissioner as to what the rights of various types of creditors on reorganization shall be, which is 2331 wholly unlawful, violates section 10, article I of the Constitution of the United States, and if ratified by the court after the same was made, said ratification would be a violation of the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

As a further fourth and separate defense, these interveners allege:

2332 X.

That the said rehabilitation, sale and transfer of assets and reinsurance agreement referred to in said petition and made and entered into on the 23rd day of July, 1936 between the Pacific Mutual Life Insurance Company of California, a corporation and Samuel L. Carpenter Jr., as Insurance Commissioner of the State of California and as liquidator of the Pacific Mutual Life Insurance Company of California, a corporation,
2333 is entirely void and of no effect and is not binding upon the parties thereto and that the same is beyond the authority of the said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of the Pacific Mutual Life Insurance Company of California, and that the execution of said agreement and the transfer of the assets by the said Insurance Commissioner is wholly unauthorized by the Insurance Code of the state of California,
2334 and is entirely beyond the power of the said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as liquidator of the Pacific Mutual Life Insurance Company of California, and the said agreement being void and beyond the power of the Insurance Commissioner under the statute in such cases made and provided, that the said agreement is of no binding effect whatever on any of the parties thereto, and that any acts done pursuant thereto are wholly null and void.

2335 XI.

That the said agreement provided in paragraph II thereof that the Commissioner shall grant, bargain, sell, assign, convey, transfer, set over and deliver to the new company the assets of the old company.

XII.

Upon information and belief that the said agreement to transfer the said assets by the said Insurance Commissioner was wholly beyond his
2336 power as Insurance Commissioner and that the same is null and void.

XIII.

Upon information and belief that by reason of various paper writings thereafter made, the Insurance Commissioner did attempt to make transfer of the said assets but that said purported transfer of said assets was wholly null and void and that the title to all of said assets remains in the said Samuel L. Carpenter, Jr., as
2337 Insurance Commissioner of the State of California in his capacity as the conservator of the Pacific Mutual Life Insurance Company of California.

As a further, fifth and separate defense, these interveners allege:

XIV.

That the said agreement entered into and the transfer of assets contemplated thereby is entirely void upon the following grounds:

2338 (1) That the said contract and the transfer of assets made pursuant thereto are wholly null and void.

(2) That the court had no power and has no power to authorize the making of said contract or to authorize the organization of the new company as provided therein.

(3) That under the Insurance Code and under the statutes of the state of California the Insurance Commissioner has no power to invest
2339 the assets of an insolvent insurance company in the stock of a new insurance company, and the court has no power to authorize him to do so.

(4) That the Insurance Commissioner has no power under the statute or otherwise to prefer one class of policy holders over another class of policy holders under the guise of reinsurance of certain class of risks.

(5) That the court is without power to au-
2340 thorize the Insurance Commissioner to prefer one class of policy holders over another class of policy holders under the guise of reinsurance of certain classes of risks.

(6) That the court has no power to prefer holders of life insurance policies in the Pacific Mutual Life Insurance Company of California over the holders of non-cancellable income policies in the same company.

(7) That the Insurance Commissioner as liquidator is without power to enter into a con-

2341 tract of reinsurance which prefers one class of risks over another.

(8) That the company being insolvent the Insurance Commissioner is without power to part with the assets securing the contracts of insurance of the company without reinsuring risks covered thereby, and cannot reinsure only part of the risks.

(9) That the making of any orders ratifying or confirming the contract referred to would be 2342 unjust, unconscionable and inequitable.

(10) That this court of equity is lending its aid to prefer one class of creditors over another class of creditors.

(11) That it is an abuse of discretion for the Insurance Commissioner to transfer the assets of an insolvent insurance company to a new company and entrust the management of the affairs of the new company to a board of directors of his selection and to the same management that 2343 led the company into its insolvency and this is entirely beyond the authority bestowed upon him by statute.

(12) That the effect of the said contract and transfer of assets violates section 10, article I of the Constitution of the United States.

(13) That there being a complete mingling of reserves for non-cancellable income policies and for life insurance policies in the old company, that the attempt by the Insurance Com-

missioner to apply the assets of the old company in his possession as conservator for the benefit of one class of creditors is wholly unauthorized, null and void.

Wherefore, interveners ask that the application for an order to liquidate and the application for a ratification of the said so-called rehabilitation, sale and transfer of assets and reinsurance plan and agreement and all orders prayed for in the said order to show cause and restraining order dated August 13, 1936 be denied and that the Insurance Commissioner be directed by the court to take such steps as will cause all the assets hertofore transferred to the new company to be returned to him as Insurance Commissioner.

H. S. DOTTENHEIM,

Attorney for Interveners, Marshall D. Hall and Joseph C. McManus, and for all holders of non-cancellable income policies not otherwise represented.

Verified.

Received copy of the within document. Aug. 24, 1936. O'Melveny, Tuller & Myers, By M. A. T. (Invalid unless countersigned)

Received copy of the within answer of intervenors this 24th day of August, 1936. U. S. Webb, atty. general, John L. Flynn, deputy E. C.

Filed Aug. 24, 1936, 12:31 p. m. L. E. Lampton, county clerk; by C. H. Holdredge, deputy.

2347 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of California, petitioner, vs. Pacific Mutual Life Insurance Company of California, a corporation, respondent, Ralph R. Huesman, also known as Raphael Robert Huesman, and Broadtown Investment Company, a corporation, Intervenors. No. 404-673.

2348

Complaint in Intervention of Ralph R. Huesman and Broadtown Investment Company, a Corporation.

Come now Ralph R. Huesman, also known as Raphael Robert Huesman, and Broadtown Investment Company, a corporation, and, by leave of court file this their complaint in intervention herein and for cause of action and intervention

2349 allege:

I.

That, at all times herein mentioned, the intervenor Ralph R. Huesman was and is the owner and holder of the following described policies of insurance issued by the respondent, Pacific Mutual Life Insurance Company of California, a corporation, to-wit:

Policy No.	Date	Amount	Kind
4793463	3/31/1933	Acdt. Death $20,000. Weekly indemnity $200.	Pacific Leader Accident
261430	10/1/1912	$1,000.00 Paid up	20 year Life
2668332	12/31/1919	$200. Mo.	Non-cancellable income, form A-232-Z
2659270	11/21/1919	$300. Mo.	Non-cancellable income, form A-233
2646822	11/17/1919	Acdt. Death $10,000	Life & Limb accident
322932	9/1/1917	$6,000.	20 yr. endowment
322933	9/1/1917	$2,000.	20 yr. endowment
361474	7/25/1919	$5,000.	20 yr. endowment
362420	7/25/1919	$5,000.	20 yr. endowment
493928	4/24/1923	$20,000.	32 yr. endowment
557508	4/24/1924	$1,000.	Ordinary life.

II.

That at all times herein mentioned the intervenor Broadtown Investment Company was and now is a corporation duly organized and existing under and by virtue of the laws of the state of California with its principal place of business in the city of Los Angeles, state of California. and that at all of said times was and now is the owner and holder of the following described policies of insurance issued by said respondent, Pacific Mutual Life Insurance Company of California, a corporation, to-wit:

2353

Policy No.	Date	Amount	Kind
411971	11/6/1920	$25,000.	Ordinary life
493930	4/24/1923	25,000.	" "
569580	11/6/1924	25,000.	" "
771178	9/22/1930	50,000.	" "
771179	9/22/1930	50,000.	" "

III.

That at all times the Pacific Mutual Life Insurance Company of California was and is a corporation organized under the laws of the state
2354 of California and has had and still has its principal place of business in the city of Los Angeles, county of Los Angeles, California. That, for the purpose of brevity, said corporation is hereinafter referred to as the "Old Company."

IV.

That at all times herein mentioned, Pacific Mutual Life Insurance Company was and is a corporation incorporated under the laws of the State of California with its principal place of
2355 business in Los Angeles, county of Los Angeles, California, and, for the purpose of brevity, this corporation is referred to as the "New Company."

V.

That Samuel L. Carpenter, Jr. is the duly appointed, qualified and acting Insurance Commissioner of the state of California.

VI.

That on or about August 13, 1936, the Insurance Commissioner of the state of California

2356 filed in this court an application for an order appointing him conservator of said Old Company; that, under date of August 11, 1936, an order of the above court was made and entered, under and by virtue of the terms of which said petitioner was appointed conservator of said Old Company and of its business, assets and affairs and that said petitioner was ordered to take possession forthwith of all books, records, property and assets of said Old Company and, as
2357 conservator, directed to formulate and prepare a rehabilitation and/or reinsurance plan or agreement concerning said Old Company to protect its policyholders, creditors, stockholders and the public in general.

That, on or about August 13, 1936, the said Insurance Commissioner filed in this court his application for an order to liquidate the assets and business of said Old Company and, on or about the 14th day of August, 1936, a petition
2358 was filed asking for an order permitting, approving and authorizing rehabilitation, sale and transfer of assets and a reinsurance plan and agreement of said Old Company and thereafter and on the same day an order to show cause with respect to rehabilitation, sale and transfer of assets and reinsurance plan and agreement was issued by the above court setting a time and place for all persons interested or claiming to be interested in said proceeding either as policyholders, creditors or stockholders of said re-

2359 spondent corporation, to appear and show cause why the above entitled court should not make its orders, among others, approving the plan and agreement and rehabilitation, sale and transfer of assets and reinsurance as set forth in said petition heretofore referred to, authorizing said Insurance Commissioner and respondent to execute an agreement as of July 22, 1936, ratifying the transfer of the assets of said Old Company and other orders to carry out the purpose and
2360 plan of said Insurance Commissioner and said respondent theretofore instituted under certain orders made and entered herein by Judge Douglas L. Edmunds, judge of the above court.

VII.

That no notice of any of said matters was given to these intervenors and there was no impartial or independent appraisal or investigation into the affairs of said Old Company made by the court previous to the making of the orders
2361 heretofore entered herein by said Judge Douglas L. Edmunds.

VIII.

That intervenors are informed and believe that the Old Company was not insolvent and allege that said sale and transfer is not for the best interests of all concerned, and allege on information and belief that a much better sale can be made even if the Old Company is distressed financially; that said plan is unfair and inequitable, is in disregard of the rights of the inter-

venors, would jeopardize the holdings of assets by the New Company as security for the payment of the policies of insurance of intervenors; that article XIV, chapter 1, part 2 of the Insurance Code is void and that it permits and authorizes proceedings that deprive intervenors of their property without due process of law.

IX.

That all of the orders heretofore made in this cause are against the best interests of said Old Company and its policyholders. Intervenors allege upon information and belief that said rehabilitation, sale and transfer plan of said Old Company with said New Company is not the best practice plan for the protection of the policyholders of the Old Company as was represented by petitioner in his said application for said sale, but intervenors allege upon information and belief that it is for the special benefit of certain stockholders of the Old Company and not for the interests of the policyholders of the same. Intervenors allege that under said plan the protection and value of their policies of insurance, together with that of all other policies of insurance issued by the old company will be greatly lessened and impaired. That intervenors allege upon information and belief that the assets of

said Old Company may be sold to interested parties without any loss of any of the rights of any of the stockholders herein interested. Intervenors allege upon information and belief that, if this matter be fully advertised and the assets placed on sale to the highest and best bidder, the interests of intervenors and other policyholders similarly situated will be more fully and adequately protected.

X.

That the policies held by intervenors have been issued and in force since the dates hereinbefore shown and that each and every of the premiums thereon have been paid from that time until the present time.

Wherefore, the intervenors pray judgment as follows: That the petition of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, and the Pacific Mutual Life Insurance Company of California, a corporation, for the appointment of said Samuel L. Carpenter, Jr., as liquidator and for rehabilitation and sale of the assets, be denied; that the ratification, approval and confirmation of the orders and proceedings heretofore taken herein, as referred to in the order to show cause heretofore issued

herein and set for hearing on the 20th day of August, 1936, be denied; that the matter be held in abeyance either in the hands of the present conservator or in the hands of one to be selected by the court; that a general scheme of financial responsibility be set up preliminary to any bidder making a bid to take over the respondent company and that a feasible plan be first worked out to save and protect the rights of all the parties concerned and for whatever other relief this court may deem proper.

NEIL S. MCCARTHY,
By NEIL S. MCCARTHY,
Attorney for Intervenors.

Verified.

Endorsed: Received copy of the within document Aug. 26, 1936 O'Melveny, Tuller & Myers, by (invalid unless countersigned) Mat.

Received copy of the within complaint this 26 day of Aug. 1936. U. S. Webb, attorney general, John L. Flynn, deputy, M. Attorneys for petitioner.

Filed Aug. 26, 1936, 3:45 p. m. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

2371 In the Superior Court of the State of California, in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404,673.

Response of George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung to Order to Show Cause and Restraining Order Made in the Above Entitled Matter on August 13, 1936.

2372

Come now George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung, and responding to the above entitled order to show cause, respectfully represent and state to the court:

I.

That each of the undersigned is now, and continuously from a long time prior to the 22nd day 2373 of July, 1936, has been, a stockholder of the above named respondent, and also through all of said times is and has been the holder of a policy of life insurance issued by said respondent.

II.

That the order dated July 22, 1936, made by the Honorable Douglas L. Edmonds, appointing Samuel L. Carpenter, Jr., Insurance Commissioner of the state of California, as conservator of said respondent, is the same order referred to

2374 in the response of the undersigned to the order of the above entitled court dated August 13, 1936, to show cause why order to liquidate said respondent should not be made. Affiant hereby refers to and makes a part hereof, to the same extent as if here set forth in full, the allegations of said last mentioned response.

III.

That the order appointing said Insurance Commissioner liquidator of said respondent made on
2375 said 22nd day of July, 1936, and referred to in the order to show cause hereby replied to, was by the above entitled court on Friday, the 21st day of August, 1936, set aside and vacated, and the same was at the time of the making thereof, and is now, and ever since said 22nd day of July, 1936, has been, wholly void and of no effect.

IV.

That the order authorizing said petitioner as liquidator to enter into a rehabilitation, sale and
2376 transfer of assets and reinsurance agreement, referred to in the order to show cause, to which this is a reply, was on the 21st day of August, 1936, found and declared by this court to be void and of no effect and was set aside and vacated. That said order was at the time of the making thereof, ever since has been, and still is, void and of no effect.

V.

That by reason of the order of the above entitled court made on August 21, 1936, as afore-

said, declaring said "order of liquidation" made by the Honorable Douglas L. Edmonds on July 22, 1936, void and declaring the same to have been beyond the power and without the jurisdiction of said Douglas L. Edmonds as judge of the above entitled court to make the same, there is nothing in or about said so-called order of liquidation to be ratified or approved or confirmed or adopted or continued in force.

VI.

That by the provision of section 1019 of the Insurance Code of the state of California, it is declared that

"upon the issuance of an order of liquidation * * * the rights and liabilities of any such person (insurance company) and all creditors, policyholders, shareholders and members and all other persons interested in its assets shall, unless otherwise directed by the court, be fixed as of the date of the delivery of the order in the office of the clerk in the county wherein the application was made";

that no order of liquidation has been made in the above entitled matter, and hence no time has been fixed as of which either the rights or liabilities of the respondent or any creditor, policy-holder, shareholder or other person interested in respondent or its assets can be fixed or determined.

VII.

That there has been and is no order of liquidation of said respondent in the above entitled mat-

2380 ter, or at all, and no order appointing said Samuel L. Carpenter, Jr., Insurance Commissioner, or any other person as liquidator of all or any of the assets and/or business of said respondent.

VIII.

That said petitioner has not, and has never had, as liquidator of said respondent, any right, title or interest in or to any of the property or assets of said respondent.

2381

IX.

That said petitioner is not, and never has been, liquidator of said respondent. This court is without power or authority, unless and until an order of liquidation and an order appointing liquidator is made herein, to direct said petitioner to wind up or liquidate the business of said respondent or to formulate, prepare or submit any plan or agreement either of rehabilitation or reinsurance relating to the affairs of

2382 said respondent.

That unless and until an order to liquidate the business of said respondent, it is neither necessary nor proper to direct said petitioner or any other person to publish or otherwise give notice to policyholders, creditors or shareholders or any other persons interested in the assets of said respondent to file claims with said petitioner as liquidator or otherwise.

Wherefore, the undersigned pray:

1. That the order of liquidation made July 22, 1936, be not ratified, approved or confirmed or adopted or continued in force;

2. That no order be made fixing July 22, 1936, at the hour of 1:00 o'clock P. M. Pacific Standard Time, or any other time, as the date and time as of which the rights or liabilities of respondent or of its creditors, policyholders, shareholders or members or of any other persons interested in its affairs be fixed;

3. That neither Samuel L. Carpenter, Jr., Insurance Commissioner, or any other person, be appointed liquidator or all or any of the assets or business of respondent;

4. That no right, title or interest whatsoever in or to the assets of respondent corporation, or any thereof, be confirmed in said petitioner as liquidator of respondent;

5. That petitioner be not directed either as liquidator or otherwise to wind up or liquidate respondent's business;

6. That no injunction or restraint of any sort be declared or continued in force for the benefit of petitioner as liquidator of respondent;

7. That petitioner be not directed to publish any notice to any person or persons whomsoever directing them or any of them to file claims with said petitioner as liquidator;

2386 8. That this court order, adjudicate, and declare the order of liquidation, the order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement, each of which was made on July 22, 1936, and the order approving amendment of rehabilitation, sale and transfer of assets and reinsurance agreement, made on July 23, 1936, to have been heretofore and on the 21st day of August, 1936, declared to be void and of no
2387 effect and vacated and set aside;

9. For such other and further order as may be meet in the premises.

OSCAR LAWLER &
HAROLD JUDSON,
Attorneys for George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung.

Verified.

2388 Endorsed: Received copy 8/26/36 John L. Flynn.

Received copy of the within this 26 day of August, 1936. O'Melveny, Tuller & Myers, W. B. Carman, Jr., attorney for Pacific Mutual Life Ins. Co.

Filed Aug. 26, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy D. 11.

2389 [TITLE OF COURT AND CAUSE.]

Response of George I. Cochran, W. H. Davis, Douglas E. C. Moore, and Stanley M. McClung to "Petition With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement" and the Order to Show Cause With Respect Thereto.

Come now George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung,
2390 and responding to the "Petition with respect to rehabilitation, sale and transfer of assets and reinsurance plan and agreement," filed by the above named petitioner on August 14, 1936, and the order to show cause with respect thereto, issued on the same date, and respectfully represent and show to the court:

I.

That each of the undersigned is now, and continuously since a long time prior to the 22nd day
2391 of July, 1936, has been, a stockholder of said respondent.

II.

That each of the undersigned is now, and continuously since a long time prior to July, 1936, has been, the holder of a policy of life insurance issued by said respondent.

III.

That the order appointing liquidator on the petition to which this is a response was on the 21st day of August, 1936, found and declared by

2392 the above entitled court to have been beyond the power and authority of Honorable Douglas L. Edmonds, the judge who made the same, and to have been void from the beginning. That said last mentioned finding and adjudication is in full force and effect.

IV.

The undersigned respectfully allege that the plan and agreement referred to in paragraph IV of said petition does not preserve the value of
2393 the assets of said respondent for the benefit of its creditors or policyholders, for the following reasons, among others:

(a) It contemplates and requires the turning over of practically all of the assets of said respondent to a new corporation and excludes a large number of the policyholders and creditors of respondent from any participation or opportunity to participate therein or in the proceeds thereof;

2394 (b) Said plan and agreement exclude stockholders of said respondent from any participation or opportunity to participate in the property of respondent or any thereof.

V.

Said plan and agreement does not, either as far as possible or at all, protect the legal rights of all or any interested parties in the assets of said respondent, because

(a) It assumes that neither stockholders, creditors nor any policyholders other than so-

2395 called participating policyholders have any right or interest in or to the major portion of the property and assets of said respondent and individuals and discriminates in favor of certain of the persons interested in the property of said respondent and against other persons so interested, there having been no decree or order of court or other adjudication authorizing or warranting any such priority, preference or discrimination.

VI.

2396 Said plan and agreement does not afford the or any opportunity to policyholders to maintain, in so far as may be possible or otherwise, the continuity of their insurance policies because

It excludes non-cancellable policyholders from the opportunity to continue their insurance policies.

VII.

Said plan and agreement does not enable the 2397 established business created by respondent to be protected or maintained either as a going concern or otherwise, because

It contemplates and authorizes the destruction of the business created and carried on by respondent and the substitution therefor of a mutual insurance plan under and by which the existing rights of life insurance policyholders and non-cancellable insurance policyholders shall be materially modified and impaired without their consent.

2398 VIII.

That the order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement referred to in paragraph V of said petition was, on the 21st day of August, 1936, adjudged by the above entitled court to have been void from its inception and to be of no force and effect, and the same is true as to the order in said paragraph referred to made on the 23rd day of July, 1936,
2399 entitled "Order approving amendment of rehabilitation, sale and transfer of assets and reinsurance plan and agreement."

IX.

That the organization of said Pacific Mutual Life Insurance Company, "the new company," referred to in said plan and agreement, was pursuant to said plan and agreement, which has not been approved by any order of court, and that any transfer of funds, properties or assets which,
2400 pursuant to said plan and agreement, were to be transferred to said new corporation were and are without the authority or approval of this court, and were and are, and each of them is, void and of no effect, and in violation and derogation of the rights of policyholders, creditors, stockholders and all other persons interested therein.

X.

That the undersigned are informed and believe, and therefore state the fact to be, that the authorities of the thirty-three or more states of the United States by whom certificates of au-

2401 thority have been issued as alleged in paragraph VII of said petition were not at the time of the issuance of said certificates or any thereof, and have not been, and are not now, informed of the invalidity of said orders made by this court on July 22 and July 23, 1936, as aforesaid, or of the order of this court made on August 21, 1936, that said former orders were and are void.

XI.

That, as the undersigned are informed and
2402 believe and therefore state the fact to be, said plan and agreement will not preserve the value of the assets of said respondent or its agency organization or its good will or its intangible or non-statement assets, or any thereof; upon the same grounds, allege that said plan and agreement are not, and will not be, fair or equitable to policyholders, creditors or stockholders of respondent, and the same and said provisions for mutualization will exclude present non-cancellable
2403 policyholders and stockholders from any participation or the right to participate in any of the assets of said respondent, notwithstanding said assets may be greatly in excess of what is necessary to meet and satisfy all of the requirements of said mutualized company.

Wherefore, the undersigned respectfully pray

1. That said order permitting, approving and authorizing rehabilitation, sale and transfer of assets and reinsurance plan and agreement, made July 22, 1936, and the order approving amend-

ment of rehabilitation, sale and transfer of assets and reinsurance agreement, made July 23, 1936, be not ratified, approved or confirmed or continued in force, but, on the contrary, that it be ordered and adjudged that said orders are, and each thereof is, and has been from the time of the making thereof, void and of no effect;

2. That the plan and agreement of rehabilitation, sale and transfer of assets set forth as Exhibit "A" to said petition, be declared unfair and inequitable to respondent and the parties interested in respondent;

3. That petitioner be not authorized to enter into said agreement with said Pacific Mutual Life Insurance Company either as of July 22, 1936, or as of any other date;

4. That the transfer of assets owned by respondent to said Pacific Mutual Life Insurance Company be not ratified or approved or confirmed, but, on the contrary, that the same be held to have been without authority and void;

5. That petitioner be not authorized or directed to execute such or any documents as may to him seem necessary or desirable for the purpose of confirming title in said Pacific Mutual Life Insurance Company to any of the assets of respondent or for the purpose of carrying out either the intents or purposes of said plan and agreement;

6. That the officers, directors, agents and employees of respondent be not directed to cooperate with petitioner and said Pacific Mutual

Life *Insurance in* the effectuation of said plan either by the execution of documents or otherwise;

7. That the terms and conditions upon which it is proposed, pursuant to said plan and agreement and the amendment thereof, to issue and exchange securities be not approved;

8. That it be ordered and adjudged that the orders heretofore made by said Honorable Douglas L. Edmonds on the 22nd day of July, 1936, to liquidate and appoint a liquidator of respondent, and the order approving plan and agreement hereinabove referred to, are, and each of said orders is, and was from the time of the making thereof, void and of no effect;

9. For such other and further order as may be meet in the premises.

OSCAR LAWLER &
HAROLD JUDSON,
Attorneys for George I. Cochran, W. H. Davis, Douglas E. C. Moore and Stanley M. McClung.

Verified.

Endorsed: Received copy 8/26/36. John L. Flynn.

Received copy of the within this 26th day of August, 1936. O'Melveny, Tuller & Myers, by W. B. Carman, Jr., attorneys for Pacific Mutual Life Ins. Co.

Filed Aug. 26, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy. D. 11.

2410 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent; Pacific Mutual Life Insurance Company, a corporation, intervener. No. 404-673.

Response of Wilbur A. Beckett, Wilbur A.
2411 Beckett as Executor of the Last Will and Testament of Wesley W. Beckett, Deceased, Citizens National Trust and Savings Bank of Los Angeles, a National Banking Association, as Trustee of Its Private Trust No. 7434 for the Benefit of Francis H. Beckett, Citizens National Trust and Savings Bank of Los Angeles, a National Banking Association, as Trustee of the Trust Created Pursuant to the Provisions of the Last Will and Testa-
2412 ment of Iowa A. Beckett, Deceased, for the Benefit of Suzann Beckett, a Minor, and A. J. Beckett to Petition for Intervention and for Order to Show Cause of Pacific Mutual Life Insurance Company, a Corporation, Intervener, and Order to Show Cause Issued by Honorable Douglas L. Edmonds in the Above Entitled Matter on July 23, 1936, Application for Order to Liquidate and Order to Show Cause and Restraining Order Dated August 13, 1936, and Petition With Respect

to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement, and Order to Show Cause With Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement Dated August 14, 1936.

Come now Wilbur A. Beckett, Wilbur A. Beckett as executor of the last will and testament of Wesley W. Beckett, deceased; Citizens National Trust and Savings Bank of Los Angeles, a national banking association, as trustee of its private Trust No. 7434 for the benefit of Francis H. Beckett; Citizens National Trust and Savings Bank of Los Angeles, a national banking association, as trustee of the trust created pursuant to the provisions of the last will and testament of Iowa A. Beckett, deceased, for the benefit of Suzann Beckett, a minor, and A. J. Beckett, and in response to the foregoing petitions, applications, orders to show cause and restraining orders respectfully represent and allege:

I.

That the undersigned adopt and reallege all of their allegations contained in their petition in intervention herein filed with the above entitled court on August 19, 1936, the same as though fully herein again set forth.

II.

That the undersigned Wilbur A. Beckett, for many years last past, has been and now is the holder and owner of a policy of life insurance

2416 issued by said respondent, which policy of life insurance has been throughout said time and now is in full force and effect.

III.

That each of the undersigned is one of the persons interested in this proceeding, described and referred to in paragraph V of said petition for intervention dated July 22, 1936.

IV.

2417 That the undersigned are informed and believe and therefore allege that prior to the 22nd day of July, 1936, the said president, vice-president and general counsel of respondent and other persons whose names are to the undersigned unknown, in cooperation with said commissioner, caused to be prepared all, each and every of the applications, petitions and orders referred to in the petition of Pacific Mutual Life Insurance Company for intervention and the plan and agreement referred to in said petition together 2418 with the form for conveyance from said petitioner to said intervener referred to in said petition for intervention.

V.

That the preparation of each and all of the papers aforesaid was secret and without the knowledge of the undersigned or either of them, and, as the undersigned are informed and believe and therefore state the fact to be, without the knowledge of a majority of the directors of

2419 VI.

That on said 22nd day of July, 1936, all, each and every of the applications, petitions and orders (except the petition and order dated July 23, 1936), together with said plan and agreement, were practically simultaneously presented and submitted to Honorable Douglas L. Edmonds, judge of the above entitled court, in the above entitled matter, and each, every and all of said orders, except said order dated July 23, 1936,
2420 were at said time signed by said Honorable Douglas L. Edmonds, judge as aforesaid.

VII.

That said Asa V. Call was, on said 22nd day of July, 1936, and for a long time prior thereto had been, attorney for said respondent, and at said time was, and on and continuously since said July 22, 1936, has been, and is now, the attorney also for said intervener.

VIII.

2421 That reference is hereby made to the various petitions, applications, plan and agreement referred to in said petition for intervention and on file in the above entitled matter, for further particulars.

IX.

That on said 22nd day of July, 1936, and for a long time prior thereto, said Honorable Douglas L. Edmonds was, and he still is, the holder of a life insurance policy issued by respondent, which

2422 policy was throughout all of said times and is in full force and effect, and said Honorable Douglas L. Edmonds was and is one of the persons financially interested in this proceeding and in the affairs of said respondent, described in paragraph V of said petition in intervention and in paragraph 5 of said order to show cause.

That by reason of his said interest in this proceeding, as aforesaid, said Douglas L. Edmonds was not on said 22nd day of July, 1936, or at any
2423 time thereafter, and is not now, qualified to sit or act in the above entitled proceeding, and was and is forbidden by section 170 of the Code of Civil Procedure of the state of California to sit or act therein.

X.

That said Honorable Douglas L. Edmonds has heretofore filed in the above entitled proceeding statement and declaration and caused a memorandum thereof to be entered in the minutes of
2424 the above entitled court of his interest in said proceeding and in said respondent, as aforesaid.

XI.

That said Honorable Douglas L. Edmonds is not, and was not at the time of making either or any of the orders referred to in said petition for intervention, qualified to sit or act as judge in the above entitled matter, and that all, each and every of the orders made and signed by him as such judge in the above entitled matter was and is null, void and of no effect.

2425 XII.

Upon such information as was in possession of responding parties, they believe that respondent company was not insolvent nor in such a condition that its further transaction of business would or will be hazardous to its policy holders, creditors, or the public; and upon such information and belief deny the allegations in paragraph IV of said application for order appointing conservator.

2426 XIII.

That, as the undersigned are informed and believe and therefore state the fact to be, an interval of time of only a few moments elapsed between the making of said order appointing conservator of said respondent insurance company above referred to and the time of the making of said order for liquidation by said Honorable Douglas L. Edmonds, as aforesaid; that nothing was done by said conservator and no business 2427 was carried on by him as such prior to the making of said order for liquidation and no investigation was made by said petitioner for the purpose of ascertaining whether efforts to proceed under and pursuant to said order appointing conservator, as aforesaid, would be futile, and said petitioner, without any such investigation, forthwith applied for said order to liquidate and wind up the business of said respondent insurance company; that no full or other hearing whatsoever was had upon the application of said peti-

tioner for order to liquidate, nor was any policy holder or stockholder of said insurance company notified thereof; on the contrary, said order was made without any effort by said petitioner to proceed as such conservator pursuant to the provisions of section 1011 of the Insurance Code of the state of California, or otherwise, or to ascertain or determine whether efforts to proceed under said section would be futile.

XIV.

That all insurance policies and business, except so-called non-cancellable contracts of insurance, and all of the property and assets of said respondent, with certain minor exceptions, have been by said petitioner turned over and delivered to said corporation known as and called "Pacific Mutual Life Insurance Company," and petitioner has thereby rendered himself incapable of carrying out and administering the trusts imposed upon him as Insurance Commissioner of the State of California.

XV.

The undersigned respectfully represent and show that the agreement under and pursuant to which said assets were turned over and delivered to said Pacific Mutual Life Insurance Company,

2431 and the plan of which said agreement was and is a part, are unfair and inequitable, and in their operation have the effect of depriving and will deprive each holder of a life insurance policy issued by said respondent, and each stockholder of said respondent of property without due process of law, and deny to each such policy holder and each such stockholder the equal protection of the law, in the following particulars:

2432 Said petitioner is, by section 1057 of the Insurance Code of the state of California, "Trustee for the benefit of all creditors and all other persons interested in the estate of" said respondent insurance company.

That each and every policy holder is, and all other persons interested as creditors, stockholders or otherwise in said respondent are, interested and concerned in the integrity and maintenance 2433 of its property and assets and the general and equal availability thereof to the payment and satisfaction of all claims against said respondent.

That each and every stockholder of said corporation is interested in the property of said respondent insurance company remaining after the satisfaction of the claims of its creditors and policy holders.

2434 XVI.

That the life insurance policies issued by said respondent, referred to in paragraph V of said petition for intervention, are, as the undersigned are informed and believe and therefore state the fact to be, of the intrinsic value of upwards of fifteen dollars ($15.00) per thousand dollars ($1,000.00) of such life insurance, and that the total value of said insurance policies is many
2435 millions of dollars;

That no consideration whatever has been paid or is intended to be paid by said intervener for said insurance policies under and pursuant to the plan and agreement referred to in said petition for intervention, and neither said respondent nor any creditor or stockholder of said respondent will derive any benefit whatever from the value of said insurance policies.

2436 XVII.

That in and by said plan and agreement all of the property and assets belonging to said respondent and all consideration received by said petitioner for said property and assets are, and have been, so disposed of as to render the same and the whole thereof unavailable to either said respondent company or to policy holders, stockholders or any other persons interested therein.

2437 XVIII.

That in and by said plan and agreement and the conduct of the petitioner pursuant thereto, all of the assets of respondent have been disposed of at a valuation fixed as of December 1, 1935, which valuation is grossly and materially less than the value of said property and assets on the 22nd day of July, 1936, and does not include any value for the good will or agency structure of
2438 said respondent insurance company; that said good will and agency structure are assets of great value.

XIX.

That by said orders referred to in said petition for intervention and the operation thereof said respondent and all creditors, policy holders, stockholders and other persons interested in said respondent and in the trusts under and pursuant to
2439 which said petitioner was acting, have been without notice or hearing or any opportunity for notice or hearing whatever deprived of their property without due or any process of law whatever.

XX.

That in and by said orders and the things done by said petitioner thereunder, the contracts of holders of all insurance policies issued by said

2440 respondent are modified and impaired without the consent of the parties to said contracts and policies and without any notice or hearing or opportunity to be heard with reference thereto.

XXI.

That the holders of so-called non-participating policies of insurance issued by respondent have been by said orders and the acts of said petitioner thereunder deprived of access to or the
2441 availability of any of the property and assets of said respondent conveyed and delivered by petitioner to said intervener, and deprived of access to or the availability of any consideration received by said petitioner or agreed to be paid by said intervener for said property and assets, for the payment or satisfaction of the claim of any such non-cancellable policy holder against said respondent or against said petitioner.

2442

XXII.

That the transfer of property and assets of said respondent to said intervener by said petitioner includes "cash and securities" deposited "by said respondent with any governmental authority as a condition to the conduct of its business"; that said cash and securities so deposited by respondent includes large sums of money and securities of great value, amounting in all to

2443 several millions of dollars, all of which has been turned over to said intervener without consideration, and of which the persons for whom said petitioner is trustee and particularly the holders of non-cancellable policies and stockholders of respondent have been deprived by said conveyance, and will continue to be deprived if the latter is maintained in effect.

XXIII.

2444 That under and pursuant to said plan and agreement non-cancellable policy holders and stockholders of respondent will be deprived of all right to the three million dollars paid by petitioner to said intervener, to the property or any thereof turned over by said petitioner to said intervener, or to the stock of intervener delivered to said petitioner.

XXIV.

2445 That said orders and the acts and agreements of petitioner and intervener responsive and pursuant thereto are inequitable, unfair and confiscatory of the property of policy holders and stockholders of said respondent, and deprive each such stockholder and each such policy holder of his, her or its property without due or any process whatever, and impair the obligations of the respective contracts of each such stockholder and policy holder, in violation of the Constitution of the United States and the Constitution of the

2446 state of California, and deny to the holders of non-cancellable policies issued by said respondent and stockholders of said respondent the equal protection of the law.

Wherefore, these respondents respectfully pray as follows:

1. For an order cancelling, vacating, setting aside and holding for naught each, every and all of the orders made by said Honorable Douglas L. Edmonds in this proceeding, and any and all
2447 things done pursuant to said orders and each thereof;

2. For an order directing and commanding said intervener to return to said petitioner said three million dollars ($3,000,000) in cash and to return and reconvey to said petitioner all property and assets of every kind, character and description transferred to said intervener by said petitioner;

2448 3. For an order directing said petitioner to investigate and report to this court the facts concerning the present value of all assets and property of respondent on July 22, 1936, and the value of all outstanding life insurance policies and business of said respondent, including the good will and agency structure of said respondent, and the amount and present value of all of the deposits of money and/or securities made by said respondent with insurance authorities in the various states and other governments within

whose jurisdiction said respondent carried on and transacted life and other insurance business, and as to the availability of said cash and other securities so deposited *and as to the availability of said cash and other securities so deposited* for the benefit of the trusts of which said petitioner is trustee;

4. For an order directing said petitioner to call for propositions and plans to be submitted to this court for protecting all of the holders of policies of insurance of every kind issued by said respondent and all claimants and all creditors and stockholders of said respondent, and all other persons interested in said trust;

5. That the prayer of said petition in intervention be denied;

6. That a hearing be had as to whether the ground for order appointing conservator and restraining order existed or now exists, and that said order appointing conservator and restraining order made July 22, 1936, be discontinued, and that respondent be authorized and directed to resume title and possession of property and the conduct of its business;

7. For such other and further order as may be meet in the premises and protect the interests of all parties concerned herein.

WILBUR A. BECKETT,

WILBUR A. BECKETT

as Executor of the Last Will and Testament of Wesley W. Beckett, deceased;

2452 CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, a national banking association, as Trustee of its private Trust No. 7434 for the benefit of Francis H. Beckett;

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF LOS ANGELES, a national banking association, as Trustee of the trust created pursuant to the provisions of the Last Will and Testament of Iowa A.
2453 Beckett, deceased, for the benefit of Suzann Beckett, a minor, and A. J. Beckett,

By WILBUR A. BECKETT,
Responding Parties.

SHATTUCK, DAVIS & STORY,
By KARL LYNN DAVIS,
Attorneys for Responding Parties.

Verified.

2454 Endorsed: Received copy of the within this 26 day of August, 1936. Asa V. Call, F. Mc., attorney for respondent.

Received copy of the within this 26 day of August, 1936. ....., attorney for intervener. U. S. Webb, attorney general; John L. Flynn, deputy, M.

Filed Aug. 26, 1936, 3:58 p. m. L. E. Lampton, county clerk; by C. H. Holdredge, deputy.

2455 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, plaintiff, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent, Pacific Mutual Life Insurance Company, a corporation, intervener, The Pacific Mutual Agency Association, a voluntary mutual non-stock organization, intervener. No. 404673.

2456

Complaint in Intervention.

Leave of court first being had and obtained, The Pacific Mutual Agency Association, a voluntary mutual non-stock organization, intervener herein, files this its complaint in intervention, alleging as follows:

I.

That at all the times herein mentioned, Samuel L. Carpenter, Jr., is and has been the duly appointed, qualified and acting Insurance Commissioner of the State of California.

2457

II.

That at all times herein mentioned, the respondent, The Pacific Mutual Life Insurance Company of California, has been and now is a corporation organized, existing and doing business under and by virtue of the laws of the state of California, with its principal place of business in the city of Los Angeles, in said state;

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2458 that hereafter in this complaint in intervention said corporation may be referred to as "Old Company."

III.

That prior to on or about July 22, 1936, and for a period of, to wit, 68 years, said Old Company had been continuously engaged, in the state of California and elsewhere throughout the United States, in the business of issuing and selling life insurance, and during a portion of
2459 that time, to wit, for a period of 50 years, immediately last past, in the business of issuing and selling contracts and policies of health and accident insurance; that since on or about August, 1918, said Old Company has been issuing and selling non-cancellable contracts and policies of health and accident insurance.

IV.

That on or about July 22, 1936, the intervenor,
2460 Pacific Mutual Life Insurance Company, a corporation, was organized under and by virtue of the laws of the state of California, with its principal place of business at said city of Los Angeles. That hereinafter said corporation is sometimes referred to as "New Company." That said New Company was organized for the purpose, among others, of acquiring all or any part of the assets of any other corporation authorized to transact an insurance business, either from such corporation directly or from its conservator,

liquidator or receiver, and in connection with such acquisition to reinsure or assume any or all of the obligations of such corporation to its policyholders or other creditors, and to execute such agreements with or in favor of such corporation, its conservator, liquidator or receiver, or its policyholders, creditors or stockholders as may be approved by the board of directors of said company, and to carry on generally any and all other business necessarily or impliedly incidental thereto.

V.

That the intervenor, The Pacific Mutual Agency Association, is a voluntary mutual non-stock organization, consisting wholly and entirely of the membership made up exclusively of the general agents and managers of The Pacific Mutual Life Insurance Company of California, a corporation, respondent herein. That intervenor maintains an organization as such and operates pursuant to the provisions of a constitution and by-laws duly and regularly adopted. That the organization operates wholly and entirely for the purpose of maintaining and promoting the interest of said respondent corporation and of the members of intervenor as general agents and managers of said respon lent corporation, as well as for the purpose of promoting the interest of sub-agents under contract with said members of intervenor, and for no other purpose.

2464 VI.

That each of the members of intervenor association is under contract with said respondent company or Old Company. That under and pursuant to the terms and provisions of certain contracts between the members of said intervenor association and said Old Company or respondent corporation, each of the members of intervenor association is entitled to receive and heretofore has received from said Old Company
2465 or respondent corporation commissions in various amounts of money, amounting in many instances to m. y thousands of dollars annually on various policies of insurance and upon various contracts of insurance, all of which have been secured, closed, completed and/or written by and/or on behalf of said respondent corporation or Old Company, at the instance of and as the result of the industry, ability and negotiations conducted by said members of said intervenor association
2466 and/or their sub-agents.

VII.

That said members of said intervener association under the terms of their contracts with said Old Company are and each one of them is entitled to receive, and prior to the 22nd day of July, 1936, had been receiving commissions upon renewals of said contracts or policies of insurance theretofore procured by them as said agents of said Old Company. That the commissions upon

said renewals to which said members of said intervener association are entitled amount annually to a large sum of money, to wit, a sum in excess of $2,100,000.00. That the amount to which members of said intervener association are entitled annually as commissions upon renewals of non-cancellable policies is a large sum of money, to wit, the sum of $500,000.00.

VIII.

That heretofore and beginning on or about July 22, 1936, certain proceedings were had and taken in the matters above entitled, consisting in part as follows, to wit:

(a) The petitioner herein, Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, upon petition then and there filed in the matter as above entitled, obtained an order of the above entitled court appointing said petitioner conservator of said respondent corporation, and under the terms of said order vesting title to all the assets of said respondent corporation in said Commissioner in his official capacity as such Commissioner, and directing said Commissioner forthwith to take possession of all the property, real and personal, of all the books and records of said respondent corporation, and as such conservator to conduct the business of said respondent corporation; further, enjoining said respondent corporation, its officers and agents, from transacting any business of said respondent

corporation and/or disposing of any of its properties, and further directing said Insurance Commissioner to conduct, manage and operate the business of respondent corporation pending a final approval of a plan of rehabilitation and further authorizing said Insurance Commissioner to wind up and liquidate the business of respondent corporation.

(b) That on, to wit, July 22, 1936, said Insurance Commissioner filed a petition with respect to rehabilitation, sale and transfer of assets and reinsurance plan and agreement, and thereupon said court made and entered its order approving said plan set forth in said petition and directing, among other things, that said Insurance Commissioner proceed forthwith to organize a corporation and to subscribe to the capital stock thereof, applying as consideration therefor the properties and assets of said respondent corporation, and otherwise directing said Commissioner to execute an agreement to effect the purposes set forth in said petition with respect to rehabilitation, sale and transfer of assets and reinsurance plan and agreement, and further authorizing and directing said Commissioner to transfer forthwith to a corporation to be organized pursuant to the plan set forth in said petition, all of the assets of said respondent corporation, excepting therefrom claims which respondent corporation may have against officers or employees of respondent corporation, or against any other per-

son, growing out of any wrongful acts or omissions of officers or agents of said respondent corporation, including rights or claims under bonds of fidelity insurance.

(c) Thereafter, on, to wit, July 23, 1936, said Insurance Commissioner caused to be filed herein a petition for approval of an amendment to said plan for rehabilitation, and thereafter and on said date, to wit, July 23, 1936, said court made and entered its order approving said amendment so proposed.

IX.

That immediately following the entry of the orders hereinbefore referred to, said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, entered into an agreement and executed a written contract with Pacific Mutual Life Insurance Company, intervener herein, in conformity with the terms and provisions of said order, and pursuant to said orders and agreement all of the assets, save and excepting those specifically excepted by the terms of said order, were transferred and conveyed to and ever since have been and now are in the sole and exclusive custody and control of said Pacific Mutual Life Insurance Company, intervener herein, and said New Company is now conducting and administering and in complete and exclusive charge of the insurance business maintained and operated by said Old Company prior to said 22nd day of July, 1936.

2476 X.

That said plan of rehabilitation, sale and transfer of assets and said reinsurance plan and agreement proposed by said Samuel L. Carpenter, Jr., Insurance Commissioner, and approved by order of court, under the terms of which said New Company is now administering the affairs of said Old Company, is inequitable and unfair to the members of intervener, The Pacific Mutual Agency Association, in this: that it disregards
2477 the rights of said members as general agents and managers of said respondent corporation, in this particular, namely, in failing to provide in paragraph 14 of said rehabilitation, sale and transfer of assets and reinsurance agreement for a preservation of the rights of the members of said intervener association as general agents and managers of said respondent corporation in the assets and business of said respondent corporation, and in disregarding the rights of said gen-
2478 eral agents and managers under the terms of their said contracts with said respondent corporation and in disregarding their rights as creditors of said respondent corporation, and in transferring said property rights of said general agents and managers to said New Company without providing therefor substantial or any compensation or consideration to said general agents and managers.

Wherefore, The Pacific Mutual Agency Association, intervener, prays that said rehabilitation,

2479 sale and transfer of assets and reinsurance agreement, and the order of court authorizing and approving the same, be modified and amended so that paragraph 14 of said agreement shall read as follows:

"14. The New Company hereby assumes, subject to the limitation and exception hereinafter stated, any obligations under any contract heretofore made by the Old Company with any agent (regardless of classification), manager, or
2480 supervisor, it being recognized that the services of the agents who produced, or under whose direction or supervision was produced, the business reinsured or assumed hereunder in servicing said business, and the maintaining of same in force, is to the ultimate interest and advantage of the policyholders of the Old Company. The New Company shall not assume or be bound by any agreement which the Old Company may have made with agents with respect to payment of
2481 commissions on policies after lapsation."

and for such other and further relief as to the court may appear equitable and just in the premises.

COSGROVE & O'NEIL,
By T. B. COSGROVE,
Attorneys for Intervener.

Verified.

Endorsed: Filed Aug. 28, 1936, 12:15 p. m. L. E. Lampton, county clerk; by J. MacGregor, deputy.

2482 [TITLE OF COURT AND CAUSE.]

Order Ratifying and Confirming Intervention of Pacific Mutual Life Insurance Company, and Ratifying and Confirming Order to Show Cause Issued on Petition for Intervention of Said Pacific Mutual Life Insurance Company.

Whereas, heretofore and on the 23rd day of July, 1936, Pacific Mutual Life Insurance Com-
2483 pany, a corporation, filed herein its petition for leave to intervene as a party in this proceeding and for an order to show cause why the prayer of its said petition in intervention should not be granted; and

Whereas, this court on the same day, acting through Honorable Douglas L. Edmonds, one of the judges of this court, issued its order there-
2484 on permitting such intervention, and issued an order directing notice to be given to all interested parties and permitting them to appear and present any objections they had to the granting of the prayer of said petition in intervention of said Pacific Mutual Life Insurance Company; and

Whereas, said Pacific Mutual Life Insurance Company was on July 23, 1936, and ever since has been, a proper and a necessary party to this

2485 cause, and it appearing to this court that it would have been the duty of the court to bring said Pacific Mutual Life Insurance Company into this proceeding as a party had it not voluntarily sought leave to intervene, and it further appearing that the cause of justice will be promoted by confirming and ratifying said leave to intervene and said order to show cause issued thereon as of July 23, 1936; and

2486 This court and the parties to this proceeding having recognized said Pacific Mutual Life Insurance Company as being a party intervener in the cause ever since July 23, 1936, all parties to this proceeding having treated it as being a party intervener in this proceeding;

And other good cause appearing therefor, it is hereby ordered:

2487 1. The application of said Pacific Mutual Life Insurance Company, a corporation, to intervene in this proceeding is granted as of the time that said application was filed, to wit, July 23, 1936, and it is ordered that said Pacific Mutual Life Insurance Company is and has been a party to this proceeding and cause at all times from and after the filing of its said application for leave to intervene.

2488 2. The order of this court made by said Honorable Douglas L. Edmonds granting leave to intervene is confirmed, ratified and approved as of the same date.

3. The order of this court signed by said Honorable Douglas L. Edmonds, dated July 23, 1936, directing notice of the hearing on said petition in intervention of Pacific Mutual Life Insurance Company to be given and affording
2489 to interested parties an opportunity to appear and be heard thereon, is hereby adopted, confirmed, ratified and approved as of July 23, 1936.

Done in open court this 29 day of August, 1936.

HENRY M. WILLIS,
Judge of Said Superior Court.

2490 Endorsed: Filed Aug. 29, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy. D. 11.

2491 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404-673.

Petition of E. B. Tilton, Wilber G. Katz, and
2492 **Frank L. Stebbins, as a Committee Representing Holders of Non-Cancellable Health and Accident Policies of Respondent for Leave to Intervene.**

Now come E. B. Tilton, Wilber G. Katz and Frank L. Stebbins, by Bell, Boyd & Marshall and Newlin & Ashburn, their attorneys, and respectfully represent to the court as follows:

1. Petitioner, Wilber G. Katz, has heretofore,
2493 together with Norman Crawford and Robert A. Crawford, filed an intervening petition in this cause objecting to the plan and agreement of rehabilitation and reinsurance for the respondent presented to the court on or about July 22, 1936.

2. On August 18, 1936, said E. B. Tilton, as chairman, together with said Wilber G. Katz, and Frank L. Stebbins, as secretary (both of

2494 whom reside in the county of Cook and state of Illinois and are residents of that state), formed a committee for the holders of non-cancellable health and accident policies issued by The Pacific Mutual Life Insurance Company of California, respondent herein.

3. Said E. B. Tilton holds policy No. 5512192 of respondent's non-cancellable health and accident policies, issued to him under date
2495 of December 14, 1927, carrying an indemnity rate for total loss of time of $200 per month. Said Frank L. Stebbins holds policy No. 5512073 of respondent's non-cancellable health and accident policies, issued to him under date of January 12, 1928, carrying an indemnity rate for total loss of time of $100 per month. All premiums have been duly paid under said poli-
2496 cies, and they are now in full force and effect. Your petitioner, E. B. Tilton and Frank L. Stebbins, respectfully pray that they may be allowed to intervene in these proceedings under the petition heretofore filed by Wilber G. Katz, *et al.*, and that they may be made additional intervening petitioners in said petition.

4. Said petitioners named in this petition further represent that not until August 7, 1936,

2497 did some of them learn in the public press of the pendency of the original plan of reorganization proposed in these proceedings for respondent and that objections must be filed thereto by order of court on or before August 12, 1936. Your petitioner E. B. Tilton was at that time (August 7) preparing to organize a committee for policyholders, but refrained from doing so due to public announcement made in Chicago of the
2498 organization in that city of a similar committee, which committee advertised in the public press and gave interviews to the effect that it intended vigorously to prosecute the rights of such policyholders in these proceedings. Under date of August 15, 1936, public announcement was made by said committee just mentioned that it would dissolve and would take no further action in these proceedings. Thereupon, your said peti-
2499 tioner E. B. Tilton asked Frank L. Stebbins and Wilber G. Katz to join with him in forming a committee for the holders of such policies, and such committee was thereupon formed. Said committee has retained counsel and has taken actuarial advice with respect to the methods to be pursued which will best conserve the assets and insurance business of respondent herein, and

your petitioners request that as such committee they may participate in these proceedings and may join in objecting to said original plan of rehabilitation.

5. Your petitioners therefore respectfully pray that as such committee they may be permitted to intervene herein and to be made additional parties petitioner to the intervening petition of Wilber G. Katz, Norman Crawford and Robert Crawford heretofore filed in these proceedings.

E. B. TILTON,
WILBER G. KATZ and
FRANK L. STEBBINS,
as a committee for the holders of noncancellable health and accident policies of respondent,
By BELL, BOYD & MARSHALL &
NEWLIN & ASHBURN,
Their Attorneys.

BELL, BOYD & MARSHALL,
NEWLIN & ASHBURN,
Their Attorneys.

Verified.

Endorsed: Filed Sep. 1, 1936, 3:06 p. m. L. E. Lampton, county clerk; by C. J. Bergquist, deputy.

[TITLE OF COURT AND CAUSE.]

Order.

Upon the verified petition of E. B. Tilton, Wilber G. Katz and Frank L. Stebbins, the Commissioner of Insurance being present by counsel, the court having examined said petition and heard counsel, and being fully advised in the premises,

It is hereby ordered that leave be and it is hereby granted said E. B. Tilton, Wilber G. Katz and Frank L. Stebbins as a committee representing holders of noncancellable health and accident policies of respondent, to intervene in these proceedings and to become additional parties petitioner in the intervening petition of Wilber G. Katz, Norman Crawford and Robert A. Crawford heretofore filed herein.

Done in open court this 1st day of September, 1936.

HENRY M. WILLIS,
Judge of Said Superior Court.

Endorsed: Filed Sep. 1, 1936, 3:08 p. m. L. E. Lampton, county clerk; by C. J. Bergquist, deputy.

2506 [TITLE OF COURT AND CAUSE.]

Return of: David Lynn Openshaw, Rulon Wall Openshaw, Nod I. Mulville, Gilbert Knudtson, Reuel Leslie Olson, and Delvy Thomas Walton to Order to Show Cause Re Rehabilitation, Sale and Transfer of Assets, etc.

Come now David Lynn Openshaw, Rulon Wall Openshaw, Nod I. Mulville, Gilbert Knudtson, Reuel Leslie Olson, and Delvy Thomas Walton,
2507 as objecting parties in the above entitled proceeding, and in answer to the petition on file herein, dated August 14, 1936, re rehabilitation, sale and transfer of assets, etc., and by way of reply and return to the order to show cause with respect thereto, issued by this court on August 14, 1936, respectfully show:

I.

That these objecting parties are now, and from
2508 the dates hereinafter specified have been, the owners and holders of non-cancellable income policies in the respondent company, The Pacific Mutual Life Insurance Company of California, as follows:

1. Said David Lynn Openshaw made application for and had issued to him by respondent company on August 21, 1929, policy No. 5602549, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A383, and

renewable to age sixty (60), and for which he paid the annual premium at the time of issuance thereof of one hundred forty dollars ($140.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

2. Said Rulon Wall Openshaw made application for and had issued to him by respondent company on August 31, 1931, policy No. 5623536, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A754, and renewable to age of sixty (60), and for which he paid the annual premium at the time of issuance thereof of eighty-four dollars ($84.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

3. Said Nod I. Mulville made application for and had issued to him by respondent company on March 11, 1931, policy No. 5605206, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A383, and renewable to age of

2512 sixty (60), and for which he paid the annual premium at the time of issuance thereof of seventy-three dollars ($73.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

4. Said Gilbert Knudtson made application for and had issued to him by respondent company
2513 on January 15, 1920, policy No. 2668398, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. 232Z, and renewable to age sixty (60), and for which he paid the annual premium at the time of issuance thereof of fifty dollars ($50.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim
2514 has heretofore been made on the basis of such contract of insurance.

5. Said Reuel Leslie Olson made application for and had issued to him by respondent company on October 3, 1928, policy No. 5518154, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A383, and renewable to age sixty (60), and for which he paid the annual premium at the time of issuance thereof of forty-

one dollars twenty-five cents ($41.25), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

6. Said Reuel Leslie Olson further made application for and had issued to him by respondent company on February 13, 1928, policy No. 5524946, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A383, and renewable to age sixty (60), and for which he paid the annual premium at the time of issuance thereof of fifty-seven dollars seventy-five cents ($57.75), to February 13, 1934, at which time said premium was reduced to twenty-four dollars seventy-five cents ($24.75), and paid at said reduced rate up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

7. Said Delvy Thomas Walton made application for and had issued to him by respondent company on September 1, 1930, policy No. 5609874, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A383, and renewable to age sixty (60), and for which he paid the annual premium at the time of issuance

thereof of eighty-two dollars ($82.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

8. Said Delvy Thomas Walton further made application for and had issued to him by respondent company on September 1, 1933, policy No. 5635474, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A776, and renewable to age fifty-five (55), and for which he paid the annual premium at the time of issuance thereof of fifty-nine dollars ($59.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

II.

That each of the objecting parties hereto are young men, and entered into the contract of insurance against disability with the respondent company. The Pacific Mutual Life Insurance Company of California, in good faith and in the

2521 prime of youth, seeking protection against any such contingencies as might occur through disability and for protection in their respective professions as contemplated under the terms of said policies above, and in strict reliance upon the representations of the duly authorized representatives and agents of said respondent company as to its honesty, fidelity, and standing in the insurance field and among major insurance
2522 companies.

III.

That your petitioner herein, the Insurance Commissioner, in the formulation and preparation of the rehabilitation and reinsurance plan and agreement concerning respondent corporation, should provide for the equal protection of the rights of the objecting parties hereto under
2523 their respective non-cancellable income policies, along with and equal to any other rights of contract holders of insurance, made, issued, and outstanding by the respondent corporation; that the insurance commissioner is without authority to prefer one class of policyholder over another class, or to claim that certain reserves are applicable to one type of policy, and that other, lesser or no reserves are available for the protection of the class known as non-cancellable income

2524 policyholders; that to attempt any such classification would unfairly discriminate against the accrued and vested rights of these objecting parties and materially and adversely affect their said interests.

IV.

That the court is without power to authorize the insurance commissioner and petitioner herein to prefer the holders of life insurance or other 2525 policies issued by respondent corporation over these holders of non-cancellable income policies in said respondent corporation, and that authority extended to said insurance commissioner should recognize the equal rights under the law of all policyholders as a single class or group, so far as the said contract rights or vested interests have accrued thereunder, and as pertain to the existing assets and reserves of said re- 2526 spondent corporation; that any attempt by which the rights and interests of these non-cancellable policyholders are attempted to be subordinated or subject to prior rights of any other class of policyholder in and to its assets and reserves are without the power and authority of this court, or the insurance commissioner acting thereunder, and should receive judicial denunciation as an attempt to discriminate unfairly against this particular class of policyholder.

2527 V.

That the assets and reserves of respondent corporation should be held by petitioner as conservator, and should not be sold or transferred to any other person, firm, or corporation, unless and until such disposition thereof may be had on a fair and equitable basis, consistent with the value thereof; that the proceeds therefrom be held and applied in equal share and interest
2528 among all policyholders of whatsoever class, character, or nature, of respondent corporation, so as to afford these objecting parties the value of their interests in said assets and fair and equitable protection under the contracts hereinabove set forth and presently existing between them and respondent corporation, and for which premiums have been exacted by the latter from year to year.

2529 VI.

That any plan or agreement of respondent corporation should not be approved by this court unless it offers a reasonable prospect for successful rehabilitation of the debtor corporation, and provides for distribution of available assets according to the respective claims represented by policies of insurance now in force of all parties, or which may be filed in the future, and further

2530 provides an alternative for cash reimbursement of premiums paid after allowing a reasonable sum for past protection under such non-cancellable policies on a fair actuarial basis.

VII.

That these objecting parties be permitted to file in this proceeding, their claims for back premiums paid to the date hereof, and that the last premium payments made be held by petitioner,
2531 the Insurance Commissioner, intact, and such unused portion thereof returned to them upon determination of their rights and interests under policies herein set forth, and in and to the assets and reserves of the respondent corporation.

Wherefore, these objecting parties pray:

(a) That this court consider the fairness and justness of any plan of rehabilitation submitted,
2532 and carefully scrutinize any proposed sale or transfer of the assets of respondent corporation;

(b) That the rights of these objecting parties as non-cancellable income policyholders be adjudged to be vested rights, and to be entitled to equal protection in the reserves of respondent corporation, along with all other policyholders thereof;

2533 (c) For the protection of the rights and interests of said policyholders in and to the assets of said respondent corporation, and their application in equal share to the claims herein asserted, or which may in the future be filed, and

(d) For such other and further relief as to the court may seem just and equitable in the premises.

2534 DAVID LYNN OPENSHAW
RULON WALL OPENSHAW
NED I. MULVILLE
GILBERT KNUDTSON
REUEL LESLIE OLSON
DELVY THOMAS WALTON

DELVY T. WALTON,
Attorney for Objecting Non-cancellable Policyholders.

2535 Verified.

Endorsed: Received copy of the within return this 22 day of Sept., 1936. U. S. Webb, atty. gen., by John L. Flynn, deputy.

Receipt of copy of the within instrument is acknowledged this 22nd day of Sept., 1936. Overton, Lyman & Plumb, by E. Ringe.

Filed Sep. 22, 1936, 11:17 a. m. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

2536 [TITLE OF COURT AND CAUSE.]

Petition for Approval of Rehabilitation and Reinsurance Agreement.

Comes now Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as conservator of The Pacific Mutual Life Insurance Company of California, and respectfully shows to the court:

I.

2537 The Pacific Mutual Life Insurance Company of California, hereinafter referred to as the "Old Company", is, and at all times herein mentioned was, a corporation organized and existing under the laws of the state of California; and was prior to July 22, 1936, authorized to do and doing a life and disability insurance business therein and elsewhere.

II.

2538 That the Old Company has been engaged in the business of life insurance for a period of over fifty years, and, as of December 31, 1935, had life insurance in force in excess of six hundred million dollars ($600,000,000.00), approximately two-thirds of which said life insurance business was written on a participating basis and the remainder on a non-participating basis; that said life insurance business was very profitable and had built up adequate assets behind its reserves in very substantial amounts; that in ad-

2539 dition thereto, and for many years last past, said Old Company had been transacting a commercial accident and health business which, in recent years, earned a net annual profit of several hundred thousand dollars.

III.

That in the course of its operations said Old Company has built up an extensive agency organization which operates throughout more than forty (40) of the various states of the United
2540 States wherein said Old Company was authorized to transact the business of life and disability insurance; that said agency organization has been built up over the entire period of existence of said Old Company and at an expense of several million dollars; that by reason of the great volume of its business and the extent and nature of its operations, the Old Company built up a good will which is recognized throughout the entire United States.

2541

IV.

That, commencing in the year 1918, said Old Company started issuing its so-called "Non-Cancellable Income Disability Policies" (hereinafter referred to as "Non-Can Policy"); that by reason of actuarial under-calculations, the said Non-Can Policies were issued by the Old Company on an entirely inadequate premium rate and, as later experience developed, said premiums were found to be insufficient to pay the losses in-

curred thereon; that although in subsequent years said premium rates were increased, further experience disclosed that even at said increased rates, said premiums were not sufficient to maintain the reserves necessary to mature the policy obligations.

V.

That in March, 1936, your petitioner together with the insurance authorities of five of the other states of the United States in which said Old Company transacted business, commenced a formal examination customarily known as a "convention examination", of the business and affairs of said Old Company as of December 31, 1935; that said examination was completed on the 21st day of July, 1936, and the report thereof is the last report of examination made by your petitioner of said Old Company; that as a result of said examination, your petitioner determined that the premiums charged by said Old Company on said Non-Can Policies were inadequate and that there was a deficiency in excess of twenty-three million dollars ($23,000,000.00) in the reserve necessary to mature the Non-Can Policies theretofore written by said Old Company; that in excess of sixty per cent (60%) of the insurance business written by said Old Company was conducted in states other than California; that said report of said convention examination disclosed the financial status of said

Old Company and is filed with the insurance authorities of the various states wherein said Old Company is authorized to transact and transacts business; that said report of said convention examination disclosed that said Old Company was in such condition that its further transaction of business would be hazardous to its policyholders and, when filed with the insurance authorities of other states in which it transacted business, would result in a suspension or cancellation of its certificate of authority in most, if not all, of said states.

VI.

As a result of his findings in the course of said examination, and because of the hazardous condition of the Old Company as disclosed thereby, your petitioner, on July 22, 1936, filed in the above entitled court his verified application pursuant to section 1011 of the Insurance Code of the state of California; and said court did, on July 22, 1936, in this proceeding, by order duly given and made pursuant to said section, appoint your petitioner as conservator of the Old Company. On August 11, 1936, said court, by order duly given and made herein, did ratify, approve, and confirm said order and appointment, did adopt the same, and did reappoint your petitioner as conservator as aforesaid.

Your petitioner did, pursuant to his appointment as conservator as aforesaid, take posses-

2548 sion of the assets of the Old Company and did carry on and conduct the business and affairs of the Old Company.

VII.

It was obvious to your petitioner that the good will of the Old Company, the value of its agency organization, and its value as a going concern, must be preserved, and that immediate steps to that end must be taken. Your petitioner accordingly caused to be organized under the laws of
2549 the state of California a corporation known as Pacific Mutual Life Insurance Company (hereinafter referred to as "New Company"), and on July 22, 1936, caused to be transferred thereto, from funds of the Old Company coming into his hands as conservator, the sum of three million dollars ($3,000,000.00), in payment for all of its capital stock. Your petitioner, on the same date, transferred to said New Company all of the other assets formerly, and as of July 22, 1936, held by
2550 respondent corporation, or by himself as conservator, except the stock of said New Company, and rights or claims, if any, of whatsoever nature which the Old Company might have against any of the present or past officers, directors, or employees, as such, of respondent corporation, or against any other person, firm, or corporation by reason of wrongful, or illegal acts or omissions, if any, of any of the past or present officers, directors or employees of respondent corporation,

2551 including rights or claims under any fidelity or surety bond or bonds given to or in favor of the respondent corporation to secure the faithful performance of any of its officers, directors, or employees of any of their duties as such.

Since said July 22, 1936, your petitioner, as conservator, and through the agency and instrumentality of the New Company, has continued to carry on and conduct the business and affairs of the Old Company, and to preserve, so far as
2552 possible, its good will, going concern value, and agency organization.

In so doing your petitioner was required to do many acts in the conduct of said business, and accordingly he applied to the court for an order, and this court, by its order duly given and made herein on August 17, 1936, did authorize and direct your petitioner and the New Company to continue to perform the acts required of or permitted to be performed by them under the terms
2553 of a certain Rehabilitation Sale and Transfer of Assets and Reinsurance Agreement dated July 23, 1936, and on file herein, and to do certain acts in connection therewith more specifically enumerated in said order.

VIII.

Your petitioner, both prior and subsequent to his appointment as conservator as aforesaid, has given diligent study and attention to the problem of determining what steps would best serve the

2554 interests of all persons concerned; he has made diligent inquiry among possible reinsurers or purchasers for the purpose of determining what avenues were open; he has invited the presentation of plans or offers; he has carefully examined and considered all plans and suggestions which have been submitted to him for the rehabilitation of the Old Company, or for the reinsurance of its business in whole or in part.

In the opinion of your petitioner, no plan of
2555 rehabilitation or offer of reinsurance has been presented which affords to the policyholders of the Old Company the measure and the opportunity of protection provided by that contained in the proposed Rehabilitation and Reinsurance Agreement (attached hereto, marked "Exhibit A", and made a part hereof), under which your petitioner proposes to rehabilitate the Old Company through the medium of the New Company, by reinsuring in the New Company without lien
2556 all of the insurance business (other than Non-Can Policies) of the Old Company, and by partially reinsuring said Non-Can Policies, subject to restoration of benefits as more fully appears from said Exhibit "A". Your petitioner accordingly submits said proposed agreement, and asks approval thereof.

IX.

Your petitioner reserves the right, at or prior to the hearing on the petition, to propose amend-

2557 ments to said proposed rehabilitation and reinsurance agreement.

Wherefore, your petitioner prays that an order issue out of the above entitled court, fixing the time and manner of notice of a hearing to be held hereon, and directing all persons interested herein to show cause, if any they have, at a time and place to be fixed therein, why an order should not be made and entered herein:

2558 (1) ratifying, confirming, and approving the acts of your petitioner in causing to be formed, forming, and subscribing to and purchasing the capital stock of Pacific Mutual Life Insurance Company, a California corporation;

(2) ratifying, confirming, and approving the transfer and conveyance heretofore made of the assets, properties, books, and records of The Pacific Mutual Life Insurance Company of California to Pacific Mutual Life Insurance Com-

2559 pany;

(3) ratifying, confirming, and approving the rehabilitation and reinsurance agreement dated as of July 22, 1936, (with such amendments as may be proposed at or prior to the hearing hereon as hereinbefore provided) proposed to be executed by and between your petitioner and said Pacific Mutual Life Insurance Company (a copy of which said agreement is attached hereto); and authorizing and directing your petitioner to execute and enter into said agreement;

(4) authorizing and directing your petitioner to transfer, convey, release, set over, and assign to said Pacific Mutual Life Insurance Company all of the assets, properties, books, and records of The Pacific Mutual Life Insurance Company of California, excepting only (a) the capital stock of Pacific Mutual Life Insurance Company held by him and (b) the rights or claims, if any, which The Pacific Mutual Life Insurance Company of California may have against any of the present or past officers, directors, or employees, as such, of The Pacific Mutual Life Insurance Company of California, or against any other person, firm, or corporation by reason of or in connection with wrongful or illegal acts or omissions, if any, of any of said past or present officers, directors, or employees, including rights or claims on any fidelity or surety bond or bonds given to or in favor of The Pacific Mutual Life Insurance Company of California to secure the faithful performance by any of its said officers, directors, or employees of any of their duties as such;

(5) authorizing and directing your petitioner fully and faithfully to perform, carry out, and discharge all of the obligations, terms, conditions, and covenants on his part required to be performed under the terms of said rehabilitation and reinsurance agreement;

(6) ordering, decreeing, and directing that in respect of all Federal taxes finally determined

2563 to be due from The Pacific Mutual Life Insurance Company of California, the United States shall have the same legal right of priority and preference with respect to the payment of such taxes out of the assets of Pacific Mutual Life Insurance Company as it had against the assets of The Pacific Mutual Life Insurance Company of California had the within proceedings not intervened; and ratifying, confirming, and approving specifically so much of said rehabilita-
2564 tion and reinsurance agreement as relates (a) to the foregoing priority and preference of the United States, (b) to the agreement of Pacific Mutual Life Insurance Company that the United States shall have the same remedies against it and its assets with regard to the collection of said taxes as the United States had against The Pacific Mutual Life Insurance Company of California; that no provision of said agreement shall be construed as limiting the operation of said
2565 provisions in respect of said taxes; that the assets of The Pacific Mutual Life Insurance Company of California be not so valued nor the amount of the reserves so redetermined as to affect prejudicially the rights or remedies of the United States, and (c) to the agreement of all parties to said rehabilitation and reinsurance agreement that in consideration of the forbearance on the part of the United States at this time to enforce payment of its taxes, the right of the United States to enforce the provisions of said agree-

ment shall be as full and complete as if the United States were named as a party thereto;

(7) ordering that the above entitled court shall reserve and retain jurisdiction of the within proceedings for the purpose of extending or restricting the period or extent of the moratorium on cash surrender values and policy loans provided in said rehabilitation and reinsurance agreement, and for the purpose of doing any other act or making or entering any order, degree, judgment, or ruling required, permitted, or requested to be done, made, or entered in or pursuant to the terms of said agreement;

(8) ratifying, confirming, and approving any and all acts, things, or transactions performed, done, or entered into by your petitioner in the performance of and within the intent and meaning of the direction of this court in the order made and entered herein on August 11, 1936, directing your petitioner to conduct, manage, transact, and operate the business and affairs of The Pacific Mutual Life Insurance Company of California as a going insurance business, and to do any and all things your petitioner might deem necessary and appropriate for that purpose;

(9) ratifying, confirming, and approving that certain order permitting the performance

of acts and the making of payments necessary to conserve and protect assets and to prevent the waste thereof made and entered herein by this court on August 17, 1936.

SAMUEL L. CARPENTER, JR.,
SAMUEL L. CARPENTER,
Insurance Commissioner of the State of California as Conservator of The Pacific Mutual Life Insurance Company of California,
Petitioner.

U. S. WEBB,
Attorney General
By JOHN L. FLYNN,
Deputy Attorney General,
FRANK L. GUERENA,
FRANK L. GUERENA,
MITCHELL, SILBERBERG & KNUPP,
By SHEPARD MITCHELL,
Counsel for Petitioner.

Verified.

MEMORANDUM OF POINTS AND AUTHORITIES.

The Insurance Commissioner, as conservator, may, subject to the approval of the court, reinsure the business of an insurer against which he has proceeded, as provided by article XIV of chapter 1 of part 2 of the Insurance Code, or enter into rehabilitation agreements.

Insurance Code, section 1043.

2572 EXHIBIT "A".

REHABILITATION AND REINSURANCE AGREEMENT

This Agreement, made and entered into as of the 22nd day of July, 1936, between Pacific Mutual Life Insurance Company, a California corporation, and Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as conservator of The Pacific Mutual Life Insur-
2573 ance Company of California, a California corporation,

Witnesseth:

That for and in consideration of the covenants and agreements hereinafter contained, the parties hereto agree as follows:

Definitions

(1) "Commissioner" shall mean Samuel L. Carpenter, Jr., in his capacity as Insurance Com-
2574 missioner of the State of California, or his successors in office as such Commissioner.

"Conservator" shall mean Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, in his capacity as Conservator of The Pacific Mutual Life Insurance Company of California, or his successors in office as such Conservator.

"Old Company" shall mean The Pacific Mutual Life Insurance Company of California.

2575 "New Company" shall mean Pacific Mutual Life Insurance Company.

"The Court" shall mean the Superior Court of the State of California, in and for the County of Los Angeles.

"Non-Can Policies" shall mean those policies of the Old Company usually known as its "Non-Cancellable Income Policies" including the Aggregate form thereof.

"States" when referred to a governmental sub-
2576 division shall be deemed to include Territorities and the District of Columbia.

"Properties of the Old Company" shall mean all books, records, property, real and personal, tangible and intangible, and all other assets of every kind, character, and description whatsoever, and wheresoever situated, owned by the Old Company at the time of the appointment of the Conservator which shall not have been ap-
2577 plied by him against his subscription for stock of the New Company or disposed of by him in the due course of his administration as Conservator, plus all property acquired by the Conservator and the income therefrom collected by him, except (a) the stock of the New Company held by him, and (b) rights or claims, if any, of whatsoever nature which the Old Company may have against any of the present or past officers, directors, or employees, as such, of the Old Company, or against any other person, firm,

2578 or corporation, by reason of or in connection with wrongful or illegal acts or omissions, if any, of any of the past or present officers, directors, or employees of the Old Company, including rights or claims on any fidelity or surety bond or bonds given to or in favor of the Old Company to secure the faithful performance by any of its officers, directors, or employees of any of their duties as such.

"Effective Date of this Agreement" shall mean
2579 July 22, 1936, at the hour of one o'clock P. M., Pacific Standard Time.

"Liquidator" shall mean any person hereafter appointed Liquidator of the Old Company in the proceeding now pending in the Court entitled "Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California vs. The Pacific Mutual Life Insurance Company of California", and bearing number 404673 in the records of the Court; and any person succeeding to
2580 the office of such Liquidator.

Transfer of Assets

(2) The Conservator agrees, by appropriate instrument of conveyance, to sell, assign, convey, release, transfer, set over, and deliver, to the New Company, the properties of the Old Company; and to execute any and all further documents or instruments as may be reasonably necessary to effectuate and confirm the title of the New Company thereto.

2581 The Conservator shall not be required to make manual delivery of any cash or securities deposited by the Old Company with any governmental authority as a condition to the conduct of its business, nor to make manual delivery of any premiums or other assets which are in the possession of receivers of the Old Company or its assets or business, or in the possession of other governmental authorities, in states other than California; but in connection with receivership
2582 or other proceedings in such other states, the Conservator shall do any and all things proper for him to do to bring about and accomplish the delivery and transfer of such premiums or other assets to the New Company.

The Conservator shall transfer and deliver to the New Company the full amount of all premiums on any policy reinsured and assumed hereunder which have been paid to the Conservator on or after the effective date of this agreement,
2583 and the New Company shall credit the holder of such policy with the payment of such premiums accordingly, subject to repayment as hereinafter provided in the event the holder of such policy shall elect not to accept such reinsurance and assumption by the New Company. If any policy holder of the Old Company whose policy may be reinsured or assumed hereunder shall have paid his premium thereon to the Conservator subsequent to the effective date of this agreement, and shall thereafter elect to reject rein-

2584 surance and assumption of his such policy hereunder; and if the Court shall direct the Conservator or Liquidator to return said premium (or the net premium or premiums less charge for insurance service or collection charge or otherwise); then in those events the New Company shall repay to the Conservator or Liquidator, on demand, said premium, or so much thereof as the Court may have ordered returned by the Conservator or Liquidator, as aforesaid. Pur-
2585 suant to the provisions of Section 1043 of the Insurance Code of the State of California it is agreed that subsequent to the effective date of this agreement, and for such period of time as the Commissioner may determine, no investment or reinvestment of the assets of the Old Company shall be made without first obtaining the written approval of the Commissioner.

Reinsurance and Assumption of Policies Other Than Non-Can Policies

2586 (3) The New Company does hereby reinsure and assume, as of the effective date of this agreement, with the exception hereinafter provided, the liability of the Old Company and of the Conservator under all life, endowment, annuity and term policies and contracts of insurance, and all other policies and contracts of insurance, including, without limiting the same to, health and accident benefits, waiver of premium disability benefits, permanent and total disability benefits,

home office employees' disability benefit plan, and all supplementary contracts, annuity contracts, and all reinsurance contracts, issued or assumed by the Old Company and outstanding and in force on the books and records of the Old Company at the effective date of this agreement, or issued by the Conservator in his name as Conservator, in the name of the Old Company, or in the name of the New Company, subject, however, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against said policies or contracts or against any claims and actions thereon, which would have been available to the Old Company or the Conservator as aforesaid had this agreement not been made; provided, however, that no outstanding Non-Can Policies are reinsured or assumed under this paragraph, and all of such policies are hereby expressly excepted from the obligations of the New Company under this paragraph.

Reinstatement of Lapsed Policies

(4) The New Company will reinstate any policies heretofore issued, assumed, or reinsured by the Old Company, which are not excepted from the obligations of the New Company contained in the foregoing paragraph and which at the effective date of this agreement, by their terms, were entitled to reinstatement, provided that all requirements necessary to procure a reinstatement of said policies under their terms

2590 are fulfilled to the satisfaction of the New Company.

The New Company will also reinstate, during the lifetime of the insured and provided the insured is not in such condition as to be eligible for benefits under the policy, without evidence of insurability, any of the policies reinsured and assumed under Paragraph (3) hereof, which have lapsed since the effective date of this agreement, upon written application therefor by the
2591 insured and the payment of all premiums in arrears, if such application is made and premiums are paid within seventy-five (75) days after the entry of the order of the Court approving this agreement. Upon the reinstatement of such lapsed policy it shall, for all purposes, be treated (but only from and after the date of reinstatement) the same as if it had been in force on the effective date of this agreement and be subject to the terms and conditions of this
2592 agreement.

Payment of Policy Claims Other Than Claims on Non-Can Policies

(5) The New Company will pay in full, in accordance with the terms and conditions of all policies including annuities under which claims shall have been or may be made, and whether or not the claims arose or matured prior or subsequent to the effective date of this agreement, all policy claims against the Old Company

(except claims on Non-Can Policies) including, without limiting the same to, claims for death benefits, matured endowments, annuity payments, permanent total disability and premium waiver benefits, accident and sickness benefits, payments under policy settlement agreements, policy dividends left at interest with the Old Company prior to the effective date of this agreement, and payments under all other matured contracts under which the proceeds of policies and contracts were left with the Old Company prior to the effective date of this agreement; and the New Company will assume the liabilities of the Old Company with respect to deposits, moneys left with the Old Company at interest, overpayments, duplicate payments, or advance payments of premiums, and return of premiums arising from cancellations prior to July 22, 1936; all subject, however, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against any such claim or claims which would have been available to the Old Company had this agreement not been made.

Participating Department

(6) The New Company agrees to establish a separate department for Participating Life Insurance, and to allocate thereto specifically or in tenancy in common that portion of the assets conveyed to it by the Conservator (other than the Three Million Dollars ($3,000,000.) trans-

2596 ferred to the New Company for its capital stock) in the ratio in which assets appearing on the books of the Life Department of the Old Company were credited to the Participating Life Department of the Old Company on its books as of July 22, 1936, subject to such changes as may have been made therein in the ordinary course of the operations of the business of the Old Company by the Conservator, including the writing of the new participating life insurance by 2597 the New Company, and except assets of the book value of One Million, Seven Hundred Ninety-Two Thousand, One Hundred Eighteen Dollars and Ninety-seven Cents ($1,792,118.97)' transferred by the Conservator to the Accident and Health Department.

The said Three Million Dollars ($3,000,000.) transferred to the New Company for its capital stock constitutes and shall constitute the capital and paid-in surplus of the New Company; and 2598 neither the Participating Department nor the holders, present or future, of participating policies shall have any right, claim, or interest therein prior to other Departments or their policy holders. The said assets transferred to the Accident and Health Department are and shall be the property of the said Department free from any claim of the Participating Department, or the holders, present or future, of participating policies.

It is hereby agreed by the New Company, and all persons accepting reinsurance hereunder do by such acceptance agree, that the assets of the Participating Department, and its business, and the receipts in respect of said business shall, subject to the limitations hereinafter contained, be appropriated and held as absolutely for the benefit of and to the security of the policies and policy holders of that Department as though they belonged to a mutual insurance company carrying on no other business; and, to the extent of the reserves from time to time required on the policies and policy liabilities of said Department, in priority to the claims of all other creditors, past, present, and future, of said Department.

The Board of Directors of the New Company shall, from time to time, and at least annually, transfer from the Participating Department to the funds of the New Company available for its general corporate purposes, such sums as it may deem available, if any, but in no event exceeding in the aggregate ten per cent. (10%) of the net profits, (before dividends, and without charging thereto cost of acquisition of new business) then accrued on policies of the Old Company reinsured hereunder earned subsequent to the effective date of this agreement (whether arising from mortality savings, investment income, expense savings, or otherwise, and after taking into consideration gains or losses on the sale or other disposition of assets, and such reasonable adjustment in the value of any assets,

or reserves for anticipated losses thereon, or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination of the New Company). Any portions of such ten per cent. (10%) not so transferred at any time shall be cumulative, and shall be transferred from time to time thereafter, from profits, and subject to limitations as aforesaid. Any statute of limitations which might apply to bar the right to require such transfer is hereby waived.

Any surplus from time to time existing in said Department (whether arising from mortality savings, investment income, expense savings, or otherwise, and after taking into consideration gains or losses on the sale or other disposition of assets, and such reasonable adjustments in the value of any assets, or reserves for anticipated losses thereon, or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination of the New Company), may be used only for the following purposes:

(a) The payment of policy dividends to policyholders in accordance with the terms of their policies and in such amounts as the Board of Directors of the New Company may from time to time consider proper and advisable, taking into

consideration the amount of earnings and other relevant data.

(b) For the payment of any of the costs and expenses of operation of said Department, including the acquisition and carrying of new business written by said Department in such amounts as the Board of Directors of the New Company may from time to time deem reasonably necessary or desirable.

(c) Necessary working capital may be supplied to said Department from time to time from any moneys available for general corporate purposes; and the Board of Directors of the New Company shall, when in their discretion it shall appear practicable, in subordination to the rights of the policyholders of said Department, and from surpluses accumulated in said Department after the payment of reasonable and appropriate dividends to the policyholders thereof, as provided in subparagraph (a) of this paragraph 6, restore the amount of the working capital so supplied, together with interest thereon at the average rate of interest earned by the New Company during the period, to the sources from which it came.

(d) For the payment into funds of the New Company available for its general corporate purposes of a portion (not exceeding ten per cent. (10%) of the net earnings of the participating policies of the Old Company reinsured hereunder, as hereinbefore provided. In computing dividends payable to participating policyholders, any

amounts paid under this subparagraph shall be charged against said policies reinsured and no part thereof shall be charged against participating policies issued by the New Company.

(e) Any remaining portion of said surplus shall be kept separate and distinct from the funds of all other departments and shall be held as absolutely for the security of and the benefit of the policyholders of the Participating Department as though it belonged to a mutual company carrying on no other business.

Non-Participating Department

(7) The New Company further agrees to establish a separate department for its Non-Participating Life Insurance, and to allocate thereto specifically or in tenancy in common that portion of the assets conveyed to it by the Conservator in the ratio in which assets appearing on the books of the Life Department were credited to the Non-Participating Department of the Old Company on its books as of July 22, 1936, subject to such changes as may have been made therein in the ordinary course of the operation of the business of the Old Company by the Conservator, including the writing of new non-participating life insurance by the New Company.

It is hereby agreed by the New Company, and all persons accepting reinsurance hereunder do by such acceptance agree, that the assets from time to time held in said Non-Participating De-

2611 partment shall, to the extent of the reserves from time to time required on the policies and policy liabilities of said Department, be appropriated, and held as absolutely for the benefit of and to the security of the policies and policyholders of said Department as though they belonged to a company carrying on no other business, and in priority to the claims of all other policyholders or creditors, past, present, or future, of the New Company.

2612 Any surplus from time to time existing in said Non-Participating Department (whether arising from mortality savings, investment income, expense savings, or otherwise, and after taking into consideration gains or losses on the sale or other disposition of assets and such reasonable adjustments in the value of any assets, or reserves for anticipated losses thereon, or otherwise, as the Board of Directors of the New Company may from time to time establish, subject
2613 only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination of the New Company) may from time to time be used for the general corporate purposes of the New Company subject to any express limitations herein contained.

Accident and Health Department

(8) The New Company further agrees to establish a separate department for its Accident and Health Insurance (including Non-Can Policies), and to allocate thereto the assets conveyed

to it by the Conservator which had been credited to the Accident and Health Department of the Old Company on its books as of July 22, 1936, and those assets of the book value of One Million, Seven Hundred Ninety-two Thousand, One Hundred Eighteen and 97/100 Dollars ($1,792,-118.97) heretofore transferred by the Conservator to the Accident and Health Department, subject to such changes as may have been made therein in the ordinary course of the operation of the business of the Old Company by the Conservator, including the writing of new accident and health insurance by the New Company.

It is hereby agreed by the New Company, and all persons accepting reinsurance hereunder do by such acceptance agree, that the assets from time to time held in said Department shall, to the extent of the reserves from time to time required on the policies and policy claim liabilities of said Department, be appropriated for the benefit of and to the security of the policies and policy claim liabilities hereof in priority to the claims of all other policyholders or creditors, past, present, or future, of the New Company.

Any surplus from time to time existing in said Department (after taking into consideration gains or losses on the sale or other disposition of assets and such reasonable adjustments in the value of any assets, or reserves for anticipated losses thereon or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment

upon the order of the Commissioner made in the course of or as a result of any examination of the New Company) may from time to time be used for the general corporate purposes of the New Company subject to any express limitations herein contained.

Inter-Departmental Transactions

(9) Neither anything in this agreement contained, nor the separating of the business of the New Company into Departments, as aforesaid, shall be deemed to prevent the apportionment among Departments of their fair and equitable shares of expenses; nor the exchange, upon a fair and equitable basis, of assets between Departments; nor reinsurance between Departments in the ordinary course of business and at customary reinsurance rates. Any determination by the Board of Directors of the New Company with respect to any such apportionment or exchange shall be final and conclusive upon all persons interested, subject only to adjustment upon order of the Commissioner made in the course of or as a result of any examination of the New Company.

Reinsurance and Assumption of Non-Can Policies.

(10) The New Company does hereby reinsure and assume, as of the effective date of this agreement, the liability of the Old Company or of the Conservator, whether incurred in his name as

2620 Conservator, in the name of the Old Company, or in the name of the New Company under all Non-Can Policies issued by the Old Company and outstanding and in force on the books and records of the Old Company at the effective date of this agreement, subject, however, to the terms, conditions, and limitations, and only to the extent, hereinafter specifically provided; and subject, further to any and all defenses, offsets, counterclaims, cross-complaints, and rescission
2621 rights against such policies or any claims and actions thereon which would have been available to the Old Company or to the Conservator as aforesaid had this agreement not been made.

Terms, Conditions, Limitations, and Extent of Reinsurance and Assumption of Non-Can Policies

(11) The New Company does not assume any liability for monthly benefits on Non-Can Policies
2622 reinsured hereunder unless the disability commenced prior to the effective date of this agreement and notice of claim was filed in accordance with the terms of the policy, and in no event later than twenty (20) days after the effective date of this agreement, except to the extent of the following percentages of the monthly disability benefits originally provided under said policies according to the following premium classes respectively (but subject to restoration of monthly benefits as hereinafter provided):

2623

Prem. Class	Issued Under Rate Books	Policy Forms	Issued Under Policy Numbers	Percentage of Original Monthly Benefit Assumed By New Company
1918	A1445-A1445Z A1445Y-A1445X A1445W	A231 to A288 inc.	2658601 to 2698150 4600501 to 4628000 4711101 to 4712000 4730901 to 4731100	20%
2624 1921	A1687-A1687Z A1687Y-A1687X A1687W	A291 to A294 inc. A365-A366	4628001 to 4700000	35%
1926	A1958-A1958Z A1958Y	A382-A383 A386-A387 A387Z	5500001 to 5600000	45%
1929	A2293	A382-A383 A386-A387 A387Z	5600001 to 5620000	55%
2625 1931	A2367	A753 to A756 inc. A763-A764	5620001 to 5635000	65%
1932	A2432-A2432Z A2499	A775 to A780 inc.	5635001 to 6000000	90%
	A2499	Aggregate A1216 to A1221 inc.	6500001 to 7000000	90%
1935	A2567	Aggregate A1226 to A1229 inc.	7000001 to 7100000	90%

Note: All of the above mentioned Rate Books are Rate Books issued by the Old Company and copies are on file at the office of the New Company at 523 West Sixth Street, Los Angeles, California, and in the offices of the Insurance Commissioners or similar public officials of each state in which the Old Company has been transacting insurance business, except in states where such filing is not required by law.

2626 Notwithstanding the foregoing limitation on the obligation of the New Company to make monthly disability payments at such rates on such policies, to be entitled to the reinsurance and assumption of his Non-Can Policy by the New Company as aforesaid, the policyholder shall be obligated to continue to make premium payments as originally provided in his policy.

Reinstatement of Lapsed Non-Can Policies

2627 (12) The provisions of paragraph 4 of this agreement with respect to reinstatement of lapsed policies other than Non-Can Policies shall apply to Non-Can Policies, subject to the terms, conditions and limitations contained in paragraphs 10 and 11 hereof.

Payment of Claims on Non-Can Policies in Respect of Disabilities Existing Prior to Effective Date of This Agreement

2628 (13) The New Company shall be obligated to pay all disability benefits under Non-Can Policies for disabilities commencing prior to the effective date of this agreement with respect to which claims or notices of claims were duly filed in accordance with the terms of such policies, and in any event not later than twenty (20) days after the effective date of this agreement, and all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation what-

soever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to the terms of any such settlement agreements; and subject, further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company or to the Conservator as aforesaid had this agreement not been made.

Restoration of Benefits Under Non-Can Policies

(14) The Board of Directors of the New Company shall from time to time transfer from the funds of the New Company available for its general corporate purposes to a special fund for the restoration of benefits under Non-Can Policies in such manner as the Board of Directors with the approval of the Commissioner may from time to time determine, such amounts as said Board of Directors in its discretion shall determine to be not reasonably required for the reasonable, proper and profitable conduct of the operations of the New Company as a going concern. At time of any examination of the New Company by the Commissioner, the Commissioner may require the transfer of additional funds to such special fund, to the extent such additional funds available for general corporate purposes are in his opinion available without interfering with the proper and profitable conduct of the

2632 business of the New Company as a going concern.

The moneys and other assets from time to time held in such special fund shall be used by the New Company, with the approval of the Commissioner, and in such manner as he may from time to time require, for the purpose of paying additional disability benefits to holders of Non-Can Policies then, thereafter, or theretofore entitled thereto, in excess of the amounts re-
2633 quired to be paid under paragraph 11 hereof, to the end that the benefits originally provided in said Non-Can Policies as written may eventually be fully paid, including eventual full payment of benefits becoming due prior to the time of such restoration, with interest on deferred restoration payments of such benefits at the rate of three and one-half per cent. (3½%) per annum. The extent and manner of the restoration so required or approved by the Commissioner shall be bind-
2634 ing upon all holders of Non-Can Policies, and all other persons interested therein.

The New Company may at any time, with the approval of the Commissioner, transfer all of such special fund to the reserves for Non-Can Policies, and, with the approval of the Commissioner, may fully assume and reinsure all Non-Can Policies hereby partially and conditionally reinsured, to the full amount thereof and in accordance with the terms thereof as written;

2635 and if the Commissioner at the time of any examination of the New Company shall determine that in his opinion the amount of such special fund is sufficient to permit the establishment therefrom of adequate reserves for the full reinsurance of such Non-Can Policies, he may require such transfer and full reinsurance.

Upon such full reinsurance with the approval of, or in accordance with the requirements of the Commissioner, the benefits on Non-Can Pol-
2636 icies shall be deemed fully restored.

After the benefits on Non-Can Policies shall have been fully restored, the said special fund shall be abolished, and any assets remaining therein at that time shall be available for the general corporate purposes of the New Company.

The New Company shall be under no obligation to pay or restore the full benefits under Non-Can policies as originally provided therein, except in the manner and to the extent herein-
2637 before described: provided, that if title to all or substantially all of the assets of the Accident and Health Department of the New Company shall hereafter be transferred, by voluntary act (other than by statutory merger or consolidation) or by operation of law, to any person who does not in connection with such transfer assume all of the obligations of the New Company to holders of Non-Can Policies, including obligations to restore the benefits thereunder in sub-

stantially the manner in this paragraph 14 provided, then and in that event the New Company will be deemed to have fully reinsured and assumed all of the Non-Can Policies, including the obligation to pay in full all installments of the disability benefits originally provided to persons theretofore entitled thereto.

Assumption of Claims against Old Company

(15) The New Company hereby assumes and agrees to pay in full:

(a) All costs and expenses of the Conservator, including attorney's fees fixed and approved as required by law.

(b) All Federal taxes finally determined to be due from the Old Company. The United States shall have the same legal right of priority and preference with respect to the payment of such taxes out of the assets of the New Company as it had against the assets of the Old Company had these proceedings not intervened, and the New Company agrees that the United States shall have the same remedies against it and its assets with regard to the collection of such taxes as the United States had against the Old Company. No provision of this agreement shall be construed as limiting the operation of the provisions of this subparagraph; nor shall the assets of the Old Company be so valued or the amount of the reserves so redetermined as to prejudicially affect the rights or remedies of the United

2641 States. In consideration of the forbearance on the part of the United States at this time to enforce payment of its taxes, all parties hereto agree that the right of the United States to enforce the provisions of the agreement shall be as full and complete as if the United States were named a party hereto.

It is agreed that the foregoing subparagraph (b) shall be embodied in and become a part of the Court's decree of confirmation.

2642 (c) Taxes legally due from the Old Company to any State of the United States, to any County, or to any political subdivision.

(d) Wages, salaries, and pensions legally due to persons employed by the Old Company for services rendered, and current bills and expenses, other than insurance liabilities, in connection with the operation of the business of the Old Company, incurred prior to July 22, 1936, and remaining unpaid, subject of course to any de-
2643 fenses the Old Company may have had thereto.

Assumption of Claims against Conservator

(16) The New Company agrees to indemnify the Conservator against any and all claims and liabilities incurred by him in his capacity as Conservator in connection with the operation of the business of the Old Company, whether in his name as Conservator, in the name of the Old Company, or in the name of the New Company.

2644 Assumption of Claims against Liquidator

(17) In the event the Commissioner shall hereafter be appointed Liquidator of the Old Company, the New Company agrees to assume, and does hereby assume and agree to pay, all costs and expenses of such Liquidator, including attorney's fees, fixed and approved as provided by law. The New Company further agrees to pay, and does hereby agree to pay to the Liquidator for payment to claimants an amount equal
2645 to the sum of all claims against the Old Company filed with the Liquidator and finally allowed; provided, however, that the New Company shall not be required to make any payment or payments on account of any claims so filed with the Liquidator except to the extent and in the manner hereinafter provided (but the New Company, with the consent of the Commissioner, may waive the foregoing limitation and anticipate any such payments):

2646 (a) The New Company will, as of the effective date of this agreement, with the approval of or in accordance with the requirements of the Commissioner, establish reserves against all policies and policy liabilities of the Old Company subject to assumption or reinsurance hereunder (but, with respect to Non-Can Policies, only to the extent described in paragraphs 11 and 13 hereof). If any policyholders or policy claimants shall elect to reject assumption and reinsurance here-

2647 under, the New Company agrees to pay to the Liquidator, immediately after the time for filing claim with said Liquidator shall have expired, an amount equal to the reserves so originally established against their policies or claims.

(b) Whenever, pursuant to the provisions of paragraph 14 hereof, any sums are transferred to the special fund for the restoration of benefits under Non-Can Policies, the New Company shall pay to the Liquidator a further sum of
2648 money bearing the same ratio to the moneys so transferred as the Non-Can Policies (evaluated as hereinafter provided) whose holders have rejected reinsurance hereunder and upon which claims have been filed in the liquidation proceedings as aforesaid, bears to the Non-Can Policies (evaluated as hereinafter provided) whose holders have accepted reinsurance hereunder.

Until such time as the measure of the claims to the allowance of which holders of Non-Can
2649 Policies who file their claim in liquidation proceedings under the laws of the State of California are entitled shall have been determined to the satisfaction of the Liquidator and he shall so notify the New Company in writing, Non-Can Policies shall, for the purposes of this subparagraph, be evaluated on the basis of the percentage established by paragraph 11 hereof of their monthly benefit originally provided, whether or not the holders thereof have accepted reinsurance hereunder.

When the measure of the claim to the allowance of which holders of such policies are entitled, as aforesaid, shall have been determined to the satisfaction of the Liquidator, and he shall so notify the New Company in writing, Non-Can Policies shall thereafter be evaluated for the purposes of this subparagraph, on the basis of allowable claim, whether or not the holders thereof have accepted reinsurance thereunder; but subject to readjustment as hereinafter provided in case of any final determination by the courts of California of any other measure.

In the event payments have been made under any evaluation which is later altered as hereinbefore provided, a recomputation shall be made; and if as a result thereof it appears that there has been an overpayment to the Liquidator, he shall immediately refund to the New Company the amount of such overpayment; but if as a result of such recomputation it shall appear that there has been an underpayment to the Liquidator, the New Company shall adjust such underpayment solely out of funds available for its general corporate purposes, in the manner and upon the terms provided in paragraph 14 hereof for the creation of the special fund there referred to, but in priority to the claims of such fund.

(c) Any remaining amount necessary to pay and discharge the claims as aforesaid shall be

paid at ıe time benefits under the Non-Can Policies are fully restored.

(d) The aggregate of the payments to be made in subparagraph (a), (b), and (c) hereof, shall not exceed the full amount of claims finally allowed in the Liquidation proceedings as aforesaid. Any moneys paid hereunder and remaining in the hands of the Liquidator after all claims filed with him and finally allowed have been paid, shall be by him returned to the New Company.

(18) Any payments made by the New Company to the Liquidator under the provisions of paragraph 17 hereof may be made in cash or in securities or other assets satisfactory to the Liquidator taken at a valuation satisfactory to him. If payment is made otherwise than in cash, the Liquidator may, at any time, return any of such securities or other assets to the New Company at the valuation at which the same were taken, and the New Company shall substitute therefor cash or other securities or assets as aforesaid.

Proceeds of Assets Held By Conservator or Liquidator

(19) The Conservator, or, if the Commissioner is hereafter appointed Liquidator of the Old Company, such Liquidator, shall proceed in such manner and at such time as he deems proper, subject to the provisions of paragraph 20 hereof,

2656 to realize upon the assets still held by him as Conservator or as such Liquidator.

In consideration of the various covenants of the New Company herein contained, and for the purpose of protecting holders of Non-Can Policies and of assuring an equitable division of the assets in liquidation among all policyholders and creditors of the Old Company, the Conservator agrees, for himself and for the Liquidator as his successor in title, that the proceeds
2657 of any of such assets (other than assets received under the provisions of paragraph 17 hereof) which may hereafter be received by him (or by the Liquidator as his successor in title) shall be used in the manner and only in the manner hereinafter in this paragraph 19 described; and a lien or charge is hereby established upon said proceeds accordingly:

(a) Said proceeds and any part thereof may be used by the Conservator, or Liquidator for
2658 the payment of any of his costs or expenses of administration, including attorney's fees fixed and approved as provided by law; and any claims having preference in the liquidation proceedings by the laws of the United States or by the laws of the State of California; and thereupon the obligation of the New Company to pay such costs, expenses, or claims shall be released pro tanto.

(b) In the event benefits under Non-Can Policies shall not theretofore have been fully re-

stored as provided in paragraph 14 hereof, a portion of the remaining proceeds (but not exceeding the amount required to provide complete restoration of the benefits under Non-Can Policies) in the ratio which exists between the Non-Can Policies (evaluated as provided in subparagraph (b) of paragraph 17 hereof) whose holders have accepted reinsurance hereunder, and all Non-Can Policies (evaluated as provided in subparagraph (b) of paragraph 17 hereof), whether their holders have accepted reinsurance, or have rejected reinsurance hereunder, and have filed claims in the liquidation proceedings, shall be paid to the New Company, and by it transferred to the special fund described in paragraph 14 hereof.

In the event payments have been made hereunder, under any temporary evaluation which is later altered as hereinbefore permitted, a recomputation shall be made; and if as a result thereof, it appears that there has been an underpayment from the Liquidator, he shall immediately adjust such underpayment from funds in his hands; but if as a result of such recomputation it shall appear that there has been an overpayment from the Liquidator, the New Company shall repay to the Liquidator from the special fund established pursuant to paragraph 14 hereof when and as there are sufficient moneys therein, (but in priority to the rights of holders of Non-Can Policies who have accepted reinsurance here-

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2662 under to restoration of their benefits) the amount of such overpayment.

(c) Any portion of such proceeds remaining after making the payments described in subparagraphs (a) and (b) hereof shall be used to pay and discharge claims filed with the Liquidator and finally allowed.

(d) Any portion of such proceeds remaining after making the payments described in subparagraphs (a), (b) and (c) hereof shall be paid
2663 to the New Company for the purposes of the special fund described in paragraph 14 hereof, to the extent the same may be required to provide full restoration of the benefits under Non-Can Policies.

(e) Any portion of such proceeds remaining after making the payments described in subparagraphs (a), (b), (c) and (d) hereof shall be disposed of by the Liquidator in the manner
2664 provided by law.

Mutualization and Disposition of Stock of New Company

(20) Neither the Conservator, nor, if one be appointed, the Liquidator, of the Old Company, shall dispose of any of the stock of the New Company except as follows:

(a) At any time between July 1, 1946, and January 1, 1948, and thereafter so long as the Conservator or a Liquidator of the Old Company

2665 may continue to hold any or all of said stock, ten per cent (10%) of the holders of participating policies of life insurance entitled to vote at a policyholders' election on a proposal for voluntary mutualization of the New Company, whether those reinsured hereunder or those issued by the New Company (each policyholder for this purpose being regarded as one person regardless of the number of policies owned or amount of insurance held) may request the New Company
2666 to create an Appointing Committee as hereinafter provided to exercise the duties and functions hereinafter specified in respect of a proposed voluntary mutualization of the New Company, in accordance with the laws of the State of California in effect at the time of said request, or, if said laws then so permit, of any one or more departments thereof. Such request shall specify the department or departments of the New Company desired to be mutualized.

2667 Upon the receipt of such request the New Company shall create an Appointing Committee consisting of the then President of the Association of Life Insurance Presidents, the President of Leland Stanford Jr. University, and the Provost of the University of California at Los Angeles, or persons occupying similar positions if their or any of their titles shall have been changed. In the event any one or more of such persons shall refuse or be unable to act, the re-

maining member or members shall fill the vacancy or vacancies thereby created by their appointment in writing of another person or persons of similar position and standing. If all of said persons refuse or are unable to act, the Court or any Judge thereof shall, on the application of the Commissioner, designate an Appointing Committee consisting of three (3) persons of similar position and standing. Said Appointing committee, acting through not less than a majority of its members, shall designate a Price Determination Committee of not less than three and not more than five (5) persons skilled in matters of insurance company valuation, which committee, acting through not less than a majority thereof, shall determine whether in their opinion the proposed voluntary mutualization of the New Company, or of the department or departments thereof specified in said request can then be practicably accomplished having due regard to the interests of all persons interested in the New Company. If it be determined that such mutualization is not then practicable no further steps shall be taken in connection with a possible mutualization of the New Company under the provisions of this subparagraph until at least six months after the date of such determination. If in the opinion of a majority of the members of the committee such mutualization is then practicable, the committee shall determine the proper price to be paid upon such mutualization and ap-

propriate terms of payment thereof; said determination shall not be made, however, prior to January 1, 1947.

If, at the date of the appointment of such committee the New Company shall have in force Participating Life Insurance written subsequent to the effective date of this agreement in an amount in excess of its Non-Participating Life Insurance written during the same period, one-half (½) of such excess shall, for the purpose of fixing the proper price to be paid (but for no other purpose) be deemed to be, and shall be valued as, Non-Participating Life Insurance. If at the time of such appointment, there shall have been transferred from the Participating Department in accordance with the provisions of subparagraph (d) of paragraph 6 hereof, less than ten per cent. (10%) of the then accrued earnings described therein, or, if there shall have been transferred to the Participating Department any working capital pursuant to the provisions of subparagraph (c) of said paragraph 6, any unpaid balance thereof shall, for the purpose of fixing the proper price to be paid (but for no other purpose) be deemed to be a debt then due and matured. Said Committee shall in its report to the New Company include a plan of mutualization of the New Company, or of the department or departments thereof specified in said request of the policyholders. Such plan shall specify, in addition to any other rele-

vant matters, the price to be paid, the terms of payments, and the persons by whom and the manner in which the right to vote the stock of the New Company is to be exercised pending complete payment of the purchase price. In this connection the said Committee, if it deem it advisable, may provide in the plan for the creation of a voting trust, designate the initial trustees, and make provision for the appointment of their successors. Unless the benefits under Non-Can Policies have theretofore been fully restored and claims against the liquidator fully paid, such plan shall further provide that such mutualization shall not affect the provisions of paragraph 17 or of paragraph 14 hereof or the right of holders of Non-Can Policies to the restoration of benefits from the sources and in the manner therein provided.

The New Company agrees that within sixty (60) days after the making of such report (unless said report shall be to the effect that mutualization is not then practicable) it will mail copies thereof to all of its policyholders entitled to vote upon such plan or plans of mutualization if submitted according to law. If within one hundred twenty (120) days after the mailing of such notice, ten per cent. (10%) of the policyholders entitled to vote upon any such plan or plans (each policyholder being for this purpose regarded as one person regardless of the number of policies owned or amount of insurance

held) shall request in writing the submission thereof, the New Company will promptly submit the same in accordance with the laws of the State of California then in effect. The Conservator for himself and for any successors in the ownership of said stock claiming under him in any manner other than through a sale of said stock pursuant to the provisions of subparagraph (d) hereof agrees to consent and hereby consents as the holder and owner of the stock of the New Company to such plan of mutualization. In the event said mutualization plan is adopted, the Conservator, or a Liquidator as aforesaid, shall dispose of such stock in accordance with such plan. The expenses of the foregoing proceedings including costs, fees, and expenses of the Price Determination Committee, shall be borne by the New Company; and, unless the proposed plan of mutualization is consummated, shall be charged to the Participating Department thereof.

In the event the Price Determination Committee has been appointed as herein provided prior to January 1, 1948, said Committee shall have the power to extend the time within which mutualization may be effected hereunder for such period or periods of time as it may deem necessary for the orderly completion of mutualization proceedings as herein provided.

(b) If at any time prior to the expiration of the option to mutualize a plan of merger, con-

solidation, reorganization or reinsurance of the New Company is presented to the New Company, or to the Conservator or Liquidator, which in the opinion of the Board of Directors of the New Company cannot be consummated without the elimination of the provisions for mutualization herein contained, the New Company may create an Appointing Committee in the same manner as though the proceeding were under subdivision (a) of this paragraph. Said committee, acting through not less than a majority of its members, shall designate a committee of not less than three nor more than five persons, skilled in matters of insurance company administration and management. The committee so designated shall, acting through not less than a majority of its members, determine whether or not such plan of merger, consolidation, reorganization or reinsurance is practicable and desirable, having due regard to the interests of all persons interested in the New Company. If the committee determine that such plan is practical and desirable it shall determine a reasonable time which should be allowed for the consummation of the plan. Thereupon the New Company with the written approval of the Conservator or Liquidator, if then there be one, may submit to a vote of the policyholders (voting in the manner then prescribed by the laws of the State of California relating to voluntary mutualization) a proposal to suspend the mu-

tualization provisions of this agreement for the time fixed by the committee, which proposal shall contain a brief description of the plan. If a majority of the policyholders so voting (but not less than ten per cent. (10%) of those entitled to vote) vote in favor of the proposal, said provisions for mutualization shall be suspended for the time so specified and for the sole purpose of consummating the particular plan: and said plan may be consummated within said time free from said provisions and as though no such provisions had ever been contained in this agreement; but unless said plan be consummated within such time said provisions ipso facto shall become fully effective as though there had been no suspension thereof.

The New Company shall, however, at least fifteen (15) days before any vote of policyholders is called under the provisions of this subparagraph, give written notice to each of its General Agents of the intention to call or take such vote. Such notice shall be deemed sufficiently given if and when it is deposited in the United States mails in a properly stamped container, addressed to such General Agent at his latest address appearing on the records of the New Company.

(c) At any time while the stock of the New Company is held by the Conservator or the Liquidator and has not been sold by him the

2686 Old Company shall have the right to pay to the Conservator or to the Liquidator the full amount then required by the New Company to complete the restoration of Non-Can benefits and also the amount required by the Conservator or Liquidator to complete the payment of all his claims and liabilities. In the event the benefits on Non-Can Policies shall have been fully restored from earnings of the New Company, contributions of the Old Company, or its shareholders, or other-
2687 wise, and all expenses of and claims against the Conservator or Liquidator of the Old Company have been fully paid, the Conservator or such Liquidator shall, upon order of the Court distribute the stock then held by him in the manner provided by law: provided, however, that if such distribution is made prior to the expiration of the option to mutualize granted in subparagraph (a) of this paragraph 20, the distributees and their successors in the ownership of said stock, shall
2688 remain bound, until the expiration of said option, to the aforesaid consent to any mutualization plan of the New Company proposed in accordance with the provisions of subparagraph (a) of this paragraph 20.

The Conservator or Liquidator shall cause to be endorsed upon the certificates evidencing the ownership of such stock an appropriate legend giving notice of the said option to mutualize; and the New Company shall cause a similar

legend to be endorsed upon all certificates into which the same may be transferred prior to the expiration of said option.

(d) In the event the Conservator or Liquidator shall at any time determine that conditions are such as to require a sale of said stock, or any thereof, for the protection of the estate in conservation or liquidation, the New Company, or its policy holders, he may sell the same upon order of the Court made after a proper showing of the necessity for such sale upon a full hearing, of which hearing notice shall be given to such parties as the Court may determine are interested therein, and in such manner as the Court may direct.

(e) It is the purpose, spirit, and intent of this agreement that, unless the provisions for mutualization are eliminated pursuant to the provisions of subparagraph (b) of this paragraph 20, the stock of the New Company shall not be sold or disposed of prior to the full restoration of benefits under Non-Can Policies except by proceedings for mutualization, so long as a reasonable probability of completing restoration of benefits under Non-Can Policies shall continue; and also, to the end that benefits under Non-Can Policies may be restored as early as practicable, the New Company declares that it will be its policy, at all times while its stock is held by the Conservator or Liquidator, so far as is reason-

2692 ably practicable in the ordinary and reasonable conduct of its business, to endeavor to write new Non Participating insurance in an amount equal to or in excess of the amount of new Participating Insurance written by it.

(f) If the provisions of this paragraph 20, or of any one or more of the subparagraphs hereof, should be contrary to law or illegal or void, then such paragraph, subparagraph, or subparagraphs, shall be null and void, and shall be deemed 2693 separable from the remaining covenants and agreements in this agreement contained; and shall in no way affect the validity of any of the remaining provisions of this agreement.

Agents

(21) The New Company hereby assumes all obligations of the Old Company under agency contracts, provided the other party thereto accepts assumption of his contract by the New 2694 Company and agrees to continue bound thereby; provided, however, that the New Company shall not assume or be bound by any agreement or agreements which the Old Company may have made with agents with respect to the payment of commissions on any policies after lapsation. For the purpose of determining Agent's commissions, the reinsurance of policies of the Old Company under this agreement shall be deemed a continuance of existing policies, and not the writing of new insurance by the New Company.

2695 Moratorium

(22) A Moratorium shall be and is hereby imposed upon all cash surrender values and policy loans (except loans for the purpose of paying premiums due or to be due within thirty (30) days of the loan date on the same policy or on policies of any form issued with respect to the same person) for a period expiring November 22, 1936; and provided, that the period or extent of this moratorium may be extended or restricted
2696 from time to time by ex parte order of the Court made on the application of the Commissioner.

The provisions of this paragraph shall not, however, apply to any increases in values that are accumulated from premium payments or loan repayments which are received subsequent to the effective date of this agreement.

During such period as this moratorium is in
2697 effect, the cash surrender option of all policies of the Old Company shall be considered as non-existent, except as provided above, and all policy holders who do not pay their premiums, and who are entitled under their policies to a guaranteed value, will be restored to the automatic non forfeiture value (properly adjusted for any policy indebtedness and accrued interest thereon) under the policy.

2698 Notice

(23) The New Company shall mail as promptly after the making of the order approving this agreement as shall be reasonably practicable to the insured named in all policies and supplementary contracts of the Old Company in force at the effective date of this agreement, and any assignees thereof of record, a copy of this agreement as executed, to which the New Com-
2699 pany may attach its certificate of reinsurance and assumption, inserted in an envelope, first class postage prepaid, addressed to the name and address of each of the persons aforesaid last shown upon the records of the Old Company. There shall also be included therewith a notice referring to the provisions of paragraph 24 hereof with respect to the manner in which election or re-
2700 jection of the reinsurance and assumption hereby contained must be manifested. By "assignees of record" is meant assignees appearing upon the records of the Old Company at its Home Office.

Election of Policy Holders and Claimants and the Effect Thereof

(24) Policyholders and policy claimants of the Old Company may elect to accept or reject the reinsurance and assumption hereunder of his policy, contract, or claim at any time within

2701 seventy-five (75) days after the entry of the order approving this agreement. The filing with the New Company after the entry of the order of the Court approving the agreement of any claim or proof of loss shall constitute an acceptance of this agreement and a waiver of any right to reject the same. Any policyholder or policy claimant who shall fail to notify the New Company, in writing, of his rejection within said
2702 period shall automatically be deemed to have assented to and become bound by this agreement, and entitled to the benefits hereof.

The filing of a claim with the Liquidator shall, unless such claim is withdrawn within seventy-five (75) days after the entry of the order of the Court approving this agreement, be deemed a rejection of such reinsurance and assumption. The New Company may nevertheless, with the
2703 consent of the Commissioner, and upon such terms as the New Company in its sole discretion may desire to impose, permit the withdrawal of a rejection whether or not the period for election herein fixed shall have expired, and permit the person so withdrawing his rejection to accept the reinsurance and assumption herein contained.

Any person electing to accept the reinsurance and assumption herein contained shall thereby be

2704 deemed to have entered into a novation with the New Company, and to have released the Old Company from all claims, liabilities, or obligations with respect to his policy or policy claim hereby assumed or reinsured, whether wholly or partially assumed or reinsured.

Conservator Not Personally Liable

(25) No personal liability on the part of Samuel L. Carpenter, Jr. is assumed under this
2705 agreement, but he is bound by the provisions of this agreement only in his capacity as such Conservator or as Liquidator of the Old Company. All undertakings and obligations herein set forth as undertakings or obligations of the Conservator are made only in his said capacities and to such extent as he had authority to make the same, and the Conservator makes no warranty of his au-
2706 thority to make the same.

Liability of New Company Limited Hereby

(26) It is understood that the New Company does not assume any liability of any character or description whatsoever of the Old Company except as and to the extent in this agreement expressly provided, and the provisions of this agreement shall be a complete and adequate defense by the New Company to any action, other

than an action to enforce the express provisions of this agreement, which may be brought by any policy holders, policy claimants, creditors, or stockholders of the Old Company.

Assignability of Agreement

(27) This agreement and all rights, duties, and obligations hereunder shall inure to the benefit of and be binding upon the respective parties hereto, their several heirs, executors, administrators, successors, and assigns.

Approval of the Court

(28) This agreement shall not become binding upon any party hereto unless and until it shall have been approved by an order of the Court; and when so approved shall constitute an independent agreement, superseding all prior agreements; and also an amendment of the agreement of July 22, 1936, relating to the reinsurance by the New Company of the business of the Old Company in such manner that said agreement, as amended, shall read in its entirety in the language of this agreement.

In Witness Whereof, the parties hereto have executed this agreement as of July 22, 1936, at the hour of one o'clock P. M. Pacific Standard

Time, but in fact on the ... day of October, 1936.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

By .....

Its Vice-President

(Corporate Seal)

Attest:

.....

Its Asst. Secretary

"NEW COMPANY"

.....

SAMUEL L. CARPENTER, JR.

Insurance Commissioner of the State of California, as Conservator of The Pacific Mutual Life Insurance Company of California.

"CONSERVATOR"

The undersigned, Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, does hereby give his written consent to and approval of the foregoing rehabilitation and reinsurance agreement.

.....

SAMUEL L. CARPENTER, JR.

as Insurance Commissioner of the State of California.

Endorsed: Filed Sep. 25, 1936. L. E. Lampton, county clerk: by Guy Stoner, deputy.

2713 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404673.

Order to Show Cause With Respect to Rehabilitation and Reinsurance.

2714 Upon filing and reading the verified petition of Samuel L. Carpenter, Jr., insurance commissioner of the state of California, as conservator of The Pacific Mutual Life Insurance Company of California, and good cause therefor appearing,

It Is Hereby Ordered that The Pacific Mutual Life Insurance Company of California, a corporation, Pacific Mutual Life Insurance Company, a corporation, and all persons interested
2715 or claiming to be interested herein either as policyholders or stockholders of The Pacific Mutual Life Insurance Company of California, or otherwise, be and appear before the above-entitled court at the hour of ten o'clock a. m. on October 19th, 1936, in the court room of Department 11, 12th floor, Ctiy Hall, in the city of Los Angeles, state of California, then and there to show cause if any they or any of them have, why the said court should not make any and all of the following orders, to-wit:

1. Ratifying, confirming and approving the acts of said conservator in causing to be formed, forming, and subscribing to and purchasing the capital stock of, Pacific Mutual Life Insurance Company, a California corporation;

2. Ratifying, confirming and approving the transfer and conveyances heretofore made of the assets, properties, books and records of The Pacific Mutual Life Insurance Company of California to Pacific Mutual Life Insurance Company;

3. Ratifying, confirming and approving a rehabilitation and reinsurance agreement, dated July 22, 1936, with such amendments as may be proposed prior to or at the hearing hereon as provided in said petition, proposed to be executed by and between said conservator and said Pacific Mutual Life Insurance Company (a copy of which said agreement is attached to the petition of said conservator for the within order to show cause) and authorizing and directing said conservator to execute and enter into said agreement;

4. Authorizing and directing said conservator to transfer, convey, release, set over and assign to said Pacific Mutual Life Insurance Company all of the assets, properties, books and records of The Pacific Mutual Life Insurance Company of California excepting only (a) the capital stock of Pacific Mutual Life Insurance Company held

by him and (b) the rights or claims, if any, which The Pacific Mutual Life Insurance Company of California may have against any of the present or past officers, directors, or employees, as such, of The Pacific Mutual Life Insurance Company of California or against any other person, firm or corporation, by reason of or in connection with wrongful or illegal acts or omissions, if any, of any of said past or present officers, directors or employees, including rights or claims on any fidelity or surety bond or bonds given to or in favor of The Pacific Mutual Life Insurance Company of California to secure the faithful performance by any of its said officers, directors or employees of any of their duties as such;

5. Authorizing and directing said conservator fully and faithfully to perform, carry out and discharge the obligations, terms, conditions and covenants on his part required to be performed under the terms of said rehabilitation and reinsurance agreement;

6. Ordering, decreeing and directing that in respect of all Federal taxes finally determined to be due from The Pacific Mutual Life Insurance Company of California, the United States shall have the same legal right of priority and preference with respect to the payment of such taxes out of the assets of Pacific Mutual Life Insurance Company as it had against the assets of

2722 The Pacific Mutual Life Insurance Company of California had the within proceedings not intervened; and ratifying, confirming and approving specifically so much of said rehabilitation and reinsurance agreement as relates (a) to the foregoing priority and preference of the United States, (b) to the agreement of Pacific Mutual Life Insurance Company that the United States shall have the same remedies against it and its assets with regard to the collection of said taxes
2723 as the United States had against The Pacific Mutual Life Insurance Company of California, that no provisions of said agreement shall be construed as limiting the operation of said provisions in respect of said taxes, that the assets of The Pacific Mutual Life Insurance Company of California be not so valued, nor the amount of the reserves so redetermined, as to affect prejudicially the rights or remedies of the United States, and (c) to the agreement of all parties
2724 to said rehabilitation and reinsurance agreement that in consideration of the forbearance on the part of the United States at this time to enforce payment of its taxes, the right of the United Sates to enforce the provisions of said agreement shall be as full and complete as if the United States were named a party thereto;

7. Ordering that this court shall reserve and retain jurisdiction of the within proceedings for the purpose of extending or restricting the period

2725 or extent of the moratorium on cash surrender values and policy loans provided in said rehabilitation and reinsurance agreement, and for the purpose of doing any other act, or making or entering any order, decree, judgment or ruling, required, permitted or requested to be done, made or entered in, or pursuant to the terms of, said agreement;

8. Ratifying, confirming and approving any and all acts, things, or transactions performed,
2726 done or entered into by said conservator in the performance of, and within the intent and meaning of the directions of this court in the order made and entered herein on the 11th day of August, 1936, that said conservator conduct, manage, transact, and operate the business and affairs of respondent corporation as a going insurance business, and to do any and all things which he may deem necessary and appropriate for that purpose;

2727 9. Ratifying, confirming and approving that certain order permitting the performance of acts and the making of payments necessary to conserve and protect assets and to prevent the waste thereof, dated August 17, 1936.

It Is Further Ordered Hereby that notice of the time, date and place of the hearing to be had on the within order to show cause shall be given in the following manner, to-wit;

2728 1. A copy of this order to show cause shall be posted in three public places in the city of Los Angeles, to-wit: (a) the Justicia street entrance of the Hall of Justice; (b) the Broadway entrance of the Hall of Records; and (c) the Main street entrance of the City Hall; said posting to be done on or before September 30th, 1936;

2. By publishing a copy of the within order to show cause for at least ten consecutive days
2729 beginning not later than October 1st, 1936, in the following newspapers of general circulation: Los Angeles Times, Los Angeles Examiner, Los Angeles Evening Herald-Express, Los Angeles Illustrated Daily News, Los Angeles Evening News, San Francisco Examiner, San Francisco Chronicle, and Sacramento Bee;

3. By mailing, not later than October 3rd, 1936, by first-class mail, postage fully prepaid, to the insurance commissioner, or equivalent offi-
2730 cial, of each state and territory of the United States in which said The Pacific Mutual Life Insurance Company of California did business on July 22, 1936, and of the District of Columbia, a copy of the within order to show cause, together with a copy of said rehabilitation and reinsurance agreement; and

4. By mailing, not later than October 3rd, 1936, to each policyholder and stockholder of The Pacific Mutual Life Insurance Company of

California appearing as such on the books and records of said company on July 22, 1936, a notice of the time, date, place and purpose of the hearing on the within order to show cause substantially in the following form:

"The business of The Pacific Mutual Life Insurance Company of California (old company) is continuing to be conducted by Pacific Mutual Life Insurance Company (new company) which was organized by me for that purpose, in order to safeguard the interests of all policy holders and other persons interested. I have prepared a plan of rehabilitation and reinsurance of the Old Company which plan is set forth in an agreement which I purpose entering into with the New Company, and I have petitioned the court to approve this plan and agreement. The court has set the hearing on my petition before the Superior Court of the state of California, in and for the county of Los Angeles, at 10 o'clock a. m., on the 19th day of October, 1936, in room 1207 of the City Hall, Los Angeles, California, and has directed that you and all other persons interested may appear at that time and place, should you desire, and be fully heard in connection therewith. I have forwarded copies of this proposed agreement, my petition and order of the court to the insurance departments of each of the state and territories in which the Old Company did business and of the District of Colum-

2734 bia, where it is available for your examination if you desire to examine it.

This agreement, among other things, insures the continuance of this business by the New Company on what is, in my opinion, a permanent and sound basis. It also establishes the rights of the policy holders of the Old Company with respect to the New Company and necessarily covers many other subjects. Following an approval of the plan by the court with
2735 any amendments thereto, which may be suggested at the hearing and adopted by me, and approved by the court, the agreement will be executed and a copy will be forwarded to you.

I appreciate the cooperation which has been given me by the policy holders generally and other interested parties in working out the difficulties with which I was confronted in connection with the affairs of the Old Company.

.....

2736 Insurance Commissioner State of California, acting as Conservator of Pacific Mutual Life Insurance Company of California."

Said notice may be typewritten, mimeographed or printed upon an ordinary postcard suitable for mailing, shall be addressed to the addressee thereof at his last address appearing on the books and records of The Pacific Mutual Life Insurance Company of California on July 22, 1936, and shall be mailed with postage fully prepaid;

2737 5. By serving, in the manner and according to the provisions of sections 1005 and 1010 to 1013a, both inclusive, of the Code of Civil Procedure of the state of California, upon all parties or persons who have personally entered an appearance in the within proceedings, or upon their attorney or attorneys of record, a copy of the within order to show cause on or before October 3rd, 1936; and in respect of all such persons upon whom service would ordinarily be required
2738 prior to that date, the time for such service is hereby shortened so that service on or before said date shall be sufficient.

It Is Further Ordered that whenever any service or notice is required hereunder to be made or given by mail, such service, or the giving of such notice shall be deemed sufficient and complete when the notice or other paper or document so served has been deposited in the United States mail, properly addressed and postage pre-
2739 paid as aforesaid.

It Is Further Ordered and Adjudged Hereby that the method of service and giving notice hereinabove set forth is practicable, reasonable, just and sufficient.

Dated: September 25, 1936.

HENRY M. WILLIS,
Judge of the Superior Court.

Endorsed: Filed Sep. 25, 1936. L. E. Lampton, county clerk; by Guy Stoner, deputy.

2740 [TITLE OF COURT AND CAUSE.]

Answer of Interveners to Petition for Approval of Second Proposed Rehabilitation and Reinsurance Agreement.

Come now the interveners, Marshall D. Hall and Joseph C. McManus, on behalf of themselves and of all holders of non-cancelable income policies of the respondent, and for answer to the petition of the petitioner, verified Sep-
2741 tember 25, 1936, for approval of the second proposed rehabilitation and reinsurance agreement, deny, allege upon information and belief and pray as follows:

I.

Answering paragraphs IV, V, VII and VIII of petitioner's petition, these interveners have not sufficient information or belief upon the subject to enable them to answer the same, and placing their denial on that ground, deny each and
2742 every allegation therein contained, except that these interveners admit that the paper writings referred to in said paragraphs were executed and/or filed and the orders referred to in said paragraphs were made.

The balance of this answer will be devoted to interveners' answer to the plan, which, for convenience, will be divided into subheadings with letter identifications.

2743 A. Appropriation of Assets for Life Policy Holders Which Belong to the Non-Cans.

II.

For many years and until July 22, 1936, The Pacific Mutual Life Insurance Company of California, hereinafter, for convenience, called the "old company", mingled all of its assets and there is no way in which a court could determine which of the assets were held in the reserves for the life insurance policy holders, and which were 2744 held in the reserves for the non-cancelable income policy holders, hereinafter for convenience called the "non-cans".

III.

It was only very recently that any attempt was made to segregate them and they were and are still intermingled, and any attempt by the old company to segregate them was a mere matter of bookkeeping and no actual or legal segrega- 2745 tion of assets was ever made.

It was always represented to all policy holders that all of the assets of the company stood behind their policies.

The policies themselves were unqualified promises by the old company to pay upon the conditions named in the policy. They constitute mere choses in action and did not create the relation of trustee and beneficiary.

2746 IV.

All of the reserves were so intermingled that it is impossible for this court to properly or legally segregate them, and that the life policy holders had no lien upon any of the assets of the company which were separate or different from the lien of the non-cans, and that the entire assets of the company constitute one entire trust fund for its creditors, and that none of the assets of the company constitute a trust fund for 2747 any particular group of creditors.

V.

That the said second proposed rehabilitation and reinsurance agreement, marked Exhibit A, and made a part of the said petition, completely fails to take into account the foregoing facts and attempts to discriminate between the holders of non-cancelable income policies and the life insurance policies. Said Exhibit A will hereafter, for convenience, be called the "plan". Said 2748 plan has failed to take account of the said rights of the non-cans, and completely fails for that reason.

VI.

It is submitted that two questions should be first determined by this court before the plan can be properly considered: (1) the foregoing question and (2) the question of the insolvency of the old company.

2749 VII.

That in the event of insolvency, all policy holders, whether life or non-cans, are entitled to a proportionate share of the assets, without preference.

VIII.

The fact that the life insurance contracts may have been profitable contracts to the company and the non-cans unprofitable contracts is en-
2750 tirely immaterial on this question and every policy holder is entitled to his pro-rata share of the assets of the company, without preference, regardless of whether the old company, before its insolveney, happened to have a profitable or unprofitable contract with him.

IX.

That any equitable reorganization or rehabili-
2751 tation agreement, or any reorganization agreement entitled to the approval of the court must accord the same treatment to all policy holders regardless of whether they are holders of life insurance policies or holders of non-cancelable income policy contracts. The plan completely di-regards the rights of the non-cans in this respect and appropriates their share of the assets for the benefit of the life policy holders.

2752 B. Plan Not a Rehabilitation but a Reorganization Agreement and Further General Objections.

X.

That said plan is not a rehabilitation agreement for the following reasons:

1. It does not rehabilitate the Pacific Mutual Life Insurance Company of California, which remains insolvent.

2753 2. It does not follow the statute which prescribes the method of rehabilitating a company.

3. That it is entirely contrary to public policy and to the laws of the state of California to permit the Insurance Commissioner to be the sole stockholder of a rehabilitated insurance company, and, on the contrary, the policy of the state, as declared by its statutory enactments, is to divorce any control by the Insurance Commis-
2754 sioner over a rehabilitated company except as to the approval of its investments.

4. That the new corporation, so called under the agreement, should be under the control of its directors under the laws of the state of California, and not under the control or supervision of the Insurance Commissioner, which is contrary to the public policy and to the declared statutory policy of the state of California, and is contrary to the statute.

2755 5. That the said agreement is not a reinsurance agreement in any sense of the word as it provides for a novation.

6. That the plan is a plain reorganization agreement and as such is an attempt by the Insurance Commissioner to substitute for the judgment of the interested parties, namely the noncans and the life policy holders, the judgment of the Insurance Commissioner as to what the rights of various types of creditors on reorgani-
2756 zation shall be, which is wholly unlawful, violates section 10 of article I of the Constitution of the United States, the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States, and if ratified by the court, said ratification would be a violation of the Fifth Amendment to the Constitution of the United States and to the Fourteenth Amendment to the Constitution of the United States and that the
2757 execution of the agreement violates article I, section 10 of the Constitution *of the Constitution* of the United States.

C. General Objections to the Power of the Commissioner of Insurance.

XI.

That said plan, if executed, would be entirely void and of no effect, and would not be binding upon the parties thereto, and that the execution

of the same is beyond the authority of the said Samuel L. Carpenter, Jr. as Insurance Commissioner of the state of California and as Conservator of The Pacific Mutual Life Insurance Company of California, and that the execution of said agreement and the transfer of the assets by the said Insurance Commissioner is wholly unauthorized by the Insurance Code of the state of California and is entirely beyond the power of the said Samuel L. Carpenter, Jr. as Insurance Commissioner and as Conservator as aforesaid, and the said agreement will be void when executed and beyond the power of the Insurance Commissioner under the statute in such cases made and provided and that the said agreement is of no binding effect whatever on any of the parties thereto and that any acts done pursuant thereto are wholly null and void.

XIII.

That the transfer of the said assets of the old company heretofore made by the said Commissioner is wholly beyond the power of the Insurance Commissioner and that the same is null and void.

XIV.

That the said plan and said agreement, if executed, and the transfer of the assets contemplated thereby is entirely void upon the following grounds:

2761 1. That the said proposed contract and transfer of assets made pursuant thereto, if executed, would be wholly null and void.

2. That the court is without power to authorize the making of the said contract and to authorize the ratification of the organization of the new company as provided therein.

3. That under the Insurance Code and under the statutes of the state of California, the Insurance Commissioner has no power to invest the
2762 assets of an insolvent insurance company in the stock of a new insurance company, and the court has no power to authorize him to do so.

4. That the Insurance Commissioner has no power under the statute or otherwise to prefer one class of policy holders over another class of policy holders under the guise of reinsurance of certain classes of risks.

5. That the court is without power to au-
2763 thorize the Insurance Commissioner to prefer one class of policy holders over another class of policy holders under the guise of reinsurance of certain classes of risks.

6. That the court has no power to prefer the holders of the life insurance policies over the holders of non-cancelable income policies in the old company.

7. That the Insurance Commisisoner, as Conservator and/or as Liquidator and/or as Insur-

2764 ance Commissioner, is without power to enter into a contract of reinsurance which prefers one class of risks over another.

8. That the company being insolvent the Insurance Commissioner is without power to part with the assets securing the contracts of insurance of the company without reinsuring risks covered thereby, and cannot reinsure only part of the risks.

9. That the making of any orders ratifying
2765 or confirming the contract referred to would be unjust, unconscionable and inequitable.

10. That this court of equity would be lending its aid to prefer one class of creditors over another class of creditors.

11. That it is an abuse of discretion for the Insurance Commissioner to transfer the assets of an insolvent insurance company to a new company and entrust the management of the affairs
2766 of the new company to a board of directors of his selection and to the same management that led the company into its insolvency, and this is entirely beyond the authority bestowed upon him by statute.

12. That the effect of the said contract and transfer of assets would be to violate section 10, article I of the Constitution of the United States.

13. That the effect of the said contract and the making of the said order and the carrying out of said plan would violate the Fifth Amend-

2767 ment and the Fourteenth Amendment to the Constitution of the United States.

14. That there being a complete mingling of reserves for non-cans and for life insurance policies in the old company, that the attempt by the Insurance Commissioner to apply the assets of the old company in his possession as Conservator for the benefit of one class of creditors is wholly unauthorized, null and void.

2768 D. Necessary Information Omitted From Petition.

XV.

1. This is probably the first reorganization plan that was ever submitted to a court for approval without a proforma, complete balance sheet and statement of the new company with full details being presented with it, to enable the court, the interested parties, counsel, or others to properly appraise the plan. It is respectfully 2769 submitted that probable confusion will result from its absence. Otherwise each party, to visualize the result, must construct one by correlating correctly all provisions of the plan and using figures previously supplied which may not now be used, and one error will change the entire result.

In addition the following data is essential to the proper consideration of the plan:

2. What nominal assets appearing on the books of the life department of the old company

2770 are credited to the participating life department? What to the non-participating life department? (Par. 7, p. 11) (par. 6, p. 7)

3. What does the Commissioner propose to allocate to each of the three departments under the new plan?

4. What does the Commissioner claim is the value of the book assets so allocated to all three departments of the old company?

2771 5. What is the reasonable anticipation as to the amount of surplus referred to on p. 9 that may be expected to arise from operation of the par-life department based upon the experience of the last five years?

6. What is the reasonable anticipation of the surplus referred to on p. 12 that may be expected to arise from the operation of the non-par life department based upon the experience of the last five years?

2772 7. What is the amount of the reserve that the Commissioner proposes to establish for the various classes of policies as of December 31, 1935, under the language of paragragh 17 (a), segregating the reserve between par-life, non-par life, annuities, disabled non-cans, active non-cans and straight accident?

8. What reserve has been established against the policy of any particular active non-can, if established; is such reserve the measure of the claim referred to as the measure of the claim of

2773 such active non-can if he rejects assumption and reinsurance under the agreement? (P. 23, lines 26, et seq.).

9. If such reserve has not been established against the policy of any such active non-can, when would it be computed and upon what basis would the computation be made?

10. In the matter of filing claims under the conditions that an under payment has been made to the Liquidator on account of the policy of any
2774 disabled non-can, where will the balance of the money come from if the new company is subject solely to a liability limited by par. 14 to pay out of the "special fund" and such special fund might not be available until long after claims are filed and approved?

11. If the date for payment of the remaining amount necessary to discharge claims of active non-cans, does not arise until all non-can policies are fully restored, how could such claims be paid
2775 at all if non-can policies are never fully restored?

E. Specific Objections to the Plan. References Are to the Paragraph, Page and Line of the Plan.

XVI.

That the said plan is objectionable and inequitable upon the following grounds in addition to the general grounds heretofore alleged:

2776 1. The agreement provides for specific allocation and selection of assets, which are placed in trust for the life policy holders. This has the effect of creating a trust in assets which belong equally to all policy holders. (Par. 6, p. 7, l. 12.) The dangers incident upon such selection are forcefully pointed out by the Commissioner, himself, in the letter of the Commissioner of Insurance to the Occidental Life Insurance Company, dated September 18, 1936 (Par. 2 and 3,
2777 p. 2 thereof), in the following language, to-wit:

"A selection of approximately $185,000,000 of assets out of a portfolio of approximately $215,000,000 would leave with Pacific Mutual approximately $30,000,000 of assets least desirable from the standpoint of yield, liquidity and otherwise.

"Variations of 10% to 15% are not at all uncommon in appraisals. A variation of even 5% downward on $215,000,000, book value of as-
2778 sets would relieve Occidental of obligations to pay any portion of the approximately $10,000,000 offered to Pacific Mutual to be paid to Pacific Mutual from profits of operation of the reinsured Pacific Mutual business and the proposal would therefore hold out to non-cancellable income policy holders, both active life and on claim, only the speculation of return based upon the outcome of a future appraisal".

2779 2. In the event of future insolvency of the new company under this set-up, the entire expense of the administration of the insolvent estate would now be borne by the non-cans, and the selection of assets would work against them most disastrously.

3. The words "as it may deem available, if any" (p. 8, l. 23) should be stricken out as any profits available to non-cans should belong to them.

2780 4. The requirement that only 10% of the profits of the participating life department shall be reserved for the non-cans is not a fair allocation, and it is also arbitrary and the selection of a figure by the commisisoner. (P. 8, l. 25.)

5. Provision should be made whereby in addition to a definite percentage of the profits, all profits (if more) made by the participating department over and above the requirement for maintaining dividends at the rate paid before re-
2781 organization should be available for non-cans, and a higher percentage than 10% should be paid them. All net profits available to the non-cans should immediately be transferred to them, and belong to them.

6. The word "participating" should be inserted before the word "policies" (p. 8, l. 27).

7. The contract from this point (p. 9, l. 27) to the end of the paragraph (p. 11, l. 8) should be completely redrawn. It barters away prac-

2782 tically all of the safeguards and rights which were thought to be reserved to the non-cans.

8. By providing that the assets allocated to the par life shall be held as though they belonged to a mutual insurance company, the plan gives the right to the directors to appropriate any amount they please for overhead, salaries, advertising and the promotion of new business and permits them to declare dividends in excess of what were declared prior to the reorganization
2783 and in excess of what other companies are paying, to get new participating business with profits supposed to be accorded to the non-cans. This to be redrawn. (P. 8, l. 8 and 9.) This is inequitable and improper.

9. Even out of the 10% reserved for the non-cans the board of directors are not required to transfer the 10% to the non-can funds (p. 8, l. 20); the surplus (which includes the 10%) not transferred may be used for advertising,
2784 promotion and acquisition of new business without regard to the rights of the non-cans. (P. 10, l. 2 and 7.) Not only this, but the moneys available for general corporate purposes may without any limitation whatever be devoted to this end to the detriment of the non-cans. (P. 10, l. 8 to 10.)

10. The non-participating department is subject to the same comment (p. 12, l. 5 to 17). The board of directors have the power to so con-

2785 duct their business that the non-cans will never receive anything beyond the approved schedule: and they can also so conduct their business that the surplus will not be available to the non-cans for such a long period of time that the non-cans will be driven to make settlements unjust to them if they don't drop their policies in the meantime.

11. Accident and Health Department—The same comment is made in the Accident and Health Department. The agreement is not
2786 drawn in such a way that the non-cans are protected in the building up of a reserve for their protection.

12. Par. 13, p. 17, l. 17 should be so modified that a definite proportion of the losses in the non-cans for disabilities commencing prior to the effective date of the agreement be cut down substantially so as to create some parity or reasonable relationship between the amount payable to insureds for injuries occurring prior to July 22,
2787 1936 and after that date. There is no reason in equity or common sense why those of the same class who are claimants after the effective date of the agreement should suffer to such an extent as against those injured before that date. This should be determined on an actuarial basis and the cut-down of 25% has been suggested. Theoretically, the non-cans as a group are paying these losses. In a reorganization all classes should take a loss and make concessions to accomplish a result.

2788 13. Par. 14, p. 18, l. 8, et seq. is subject to the same vice and gives no rights which are measurable. The board of directors could totally disregard the rights of the non-cans by refusing to appropriate moneys for them, building up large surpluses in their entire discretion, paying large salaries, advertising, spending a large amount for increasing the business of the company on the alleged theory that ultimately the non-cans would get the benefit of it, thereby
2789 actually destroying the hopes of the non-cans and forcing settlements of policies and claims and forcing non-cans to discontinue their contracts.

14. The contract is studiously drawn to give the non-cans the least possible rights and those entirely indefinite and not enforcible at any time, except possibly on the final liquidation of the company.

15. The effect of the agreement is to wear the non-cans out and force them to drop their
2790 policies or to settle far below their actual rights. It has the appearance of a plan forced upon the Commissioner by the stockholder.

16. After cutting down the rights of the non-cans to a minimum, a clause has been inserted in the plan which entirely destroys their rights under the whole plan (p. 20, l. 4 to 21), as it gives the company the right to sell the Accident and Health Department without provision for

2791 restoration and thereby discharging themselves of all further obligations to the non-cans.

17. The entire question of the right of a non-can claimant not reinsured under the plan to a share of the assets of the company is brought up on p. 23, l. 1 to 7, and comes under one of the main objections to the plan.

18. The same objection is true of p. 23, l. 8. It places the non-cans who fail to elect to accept the plan on a parity with non-cans who compro-
2792 mise their rights by accepting the reorganization plan, and fails to take into account their right to a share of the assets. This question should be determined in advance of the approval of the plan.

19. An attempt is made to turn the company back to the old stockholders after restoration of impairment (par. 19, sub. par. (e), p. 27, l. 18 to 21). The Liquidator will own all of the stock
2793 of the new company, and unless provision is made in the plan as to the ownership of this stock by the non-cans when the Liquidator winds up the estate, the stock will be turned over to the old company by operation of law, and hence to the old stockholders. This matter is fully considered in the said subdivision (1) hereof incorporated into this paragraph by reference.

20. Mutualization will impair the rights of the non-cans in so far as it relates to their right to the equity in the company, which is considered

2794 elsewhere. (P. 27, l. 20.) The company has existed for many years without mutualization and should not have any provision which requires it to be mutualized in ten years, which is a long time in the future.

21. The effect of the provision in par. 21, p. 35, l. 28 and p. 36, l. 6, is to pay agents full commissions on all non-can policies, all of which are cut down, some as much as 80%. It should be revised.

2795 22. The agreement contains no provision for an actual voting on this agreement by the policy holders, either as a whole or in classes. It substitutes the judgment of the Commissioner for the judgment of the policy holders, and it arbitrarily determines their respective rights as between them without relation to ascertained figures. (P. 37, Par. 24, l. 17, et seq. to end of Par.) The question of the constitutionality of such a procedure is secondary to the question of 2796 whether it is equitable.

An obvious attempt to avoid the issue of the propriety of an election by the various groups of policy holders is made (Par. 24). It might very well be that a very small minority affirmatively accept reinsurance under the plan and a very small minority approve of it, but yet it would be entirely effective under said par. 24. The method adopted substitutes arbitrary determinations by the Commisisoner for the ascer-

2797 tainment of legal rights, and the effect of it is to deprive the policy holders of their property without due process of law, and to impair the obligations of their contracts.

F. Might Not a New Appraisal Result in the Present Insolvency of the New Company? Are Not the Non-Cans Entitled to Know This Before Sacrificing Their Present Enforcible Rights for the Sake of a Future Reorganization? A Present Appraisal Is
2798 Essential.

XVII.

The plan may set up a new company which is insolvent. It provides for no valuation of the assets at this time or in the near future. It provides for the arbitrary right of the board of directors to take the good assets and put them in the Life Department and leave the poor assets and the questionable assets for the non-cans.
2799 Until an appraisal is made of the assets, there is no way of determining whether the new set-up is solvent even on the reduced basis of the non-cans, especially in view of the fact that the Convention Examination discloses many irregularities and the existence of many assets which need careful present appraisal.

The Commissioner, himself, has very properly and forcibly raised this very question. In his said letter to the Occidental Life Insurance Company, dated September 18, 1936, summarily

2800 rejecting their offer dated September 11, 1936, the Commissioner states as above set forth in par. XVI hereof.

The same $185,000,000 of choice assets referred to by the Commissioner in his said letter could be selected for the life policies and it might have the effect of leaving the non-can department insolvent, and would certainly possibly leave the same less desirable assets from the standpoint of yield, liquidity and otherwise in the assets for
2801 the non-cans.

G. The Provision for Interdepartmental Exchange of Assets Should Be Eliiminated.

XVIII.

The provisions of the contract that assets are interchangeable between the three departments after making an inflexible allocation of assets to the three departments is conflicting and illogical. The agreement transfers assets to the participat-
2802 ing life department, for example, and states that they shall be for the sole benefit of the participating life department, and it then provides that the assets can be interchanged with assets of other departments within the discretion of the board of directors. This gives the power of permanently keeping the doubtful assets in the non-can reserve. As they become good in the non-can department, they could be swapped for life assets which had become non-liquid or doubtful.

2803 H. Other Doubtful Features.

The plan provides that the existing assets shall be transferred to the credit of the three departments in the new company. This apparently places all life reserve assets beyond the reach of creditors and is, of course, of doubtful constitutionality if it has that effect. Upon this set-up the new company would probably find itself unable to pay the claims assumed to be made by creditors and non-cans who refuse to consent to
2804 the new plan, the number and amount of which we have no present means of knowing, and no provision is made to cure this. If the assets transferred to the new company in the non-par life department are necessary as reserves for the non-par holders, there is then no surplus in the non-par life department with which to pay the creditors of the old company who file, nor would there be any surplus in either participating life department or the non-can life department
2805 after paying such general claims.

Par. 17 provides a limitation as to the amount of claims filed against the Liquidator that would be paid by the new company.

XX.

The rights of the non-cans are prejudiced by the provisions on p. 23 of the plan with respect to the filing of claims whereby the provision is inserted that the measure of the claims of the non-cans who do not approve is to be determined

2806 to the satisfaction of the liquidator and there is an attempt made in that paragraph to bind all non-cans who do not accept the plan and file claims to the reduced schedule of benefits set forth in par. 11. The insertion of the provision, aside from the question of its validity, is illustrative of the completeness with which the rights of the non-cans are impaired.

I. The Equity In The New Company Belongs To The Non-Cans; It Is Given By The
2807 Plan To The Stockholders Of The Old Company.

XXI.

The legal effect of the entire plan is to place the entire risk of loss of the new venture upon the non-cans and from their reserves, and give the entire equity or profit in the venture to the stockholders. The risk of loss to one group—the profits to another.

2808 There is obviously a risk of loss in any commercial venture. The new company may be successful, and it may not. Indeed, upon an appraisal it might be found to be insolvent, or nearly insolvent under the present plan, and assuming that it is solvent, poor management, poor business or hard times might make it a failure.

It is the rule, both in law and in business that those who take the risk of the loss are entitled to the profits.

2809 The risk of loss is entirely upon the non-cans. If the participating department and the non-participating department of the life business are made solvent under the plan, as they are, then the entire capital for the new company comes out of the non-can reserves.

Moreover, they are contributing in addition to this capital out of their depleted reserves, their fair share of the assets of the old company, 2810 which upon liquidation would belong share and share alike to them and the life policies.

XXII.

The report of the Convention Examination of the Pacific Mutual Life Insurance Company as of December 31, 1935, now on file with the court is incomplete as it omits to include the supplementary report of Convention Examination of the Pacific Mutual Life Insurance Company of 2811 California as of December 31, 1935, signed by representatives of the states of California, Louisiana, Ohio, Texas, Virginia and Washington, the contents of which are essential to a proper consideration of the plan and in order to have an understanding of the Convention Examination on file, it is necessary to examine the Supplemental Report of the Convention Examination referred to, and these interveners beg leave to refer to it upon the argument of motion and it is incorporated in this answer by reference.

2812 XXIII.

Under the heading "Management Investment", the report says:

"Certain transactions of the Company, which came to our attention were of such a nature, as to cause us to make an investigation of the entire management of the Company. This investigation covered careful scrutiny of a number of mortgage loan and collateral loan transactions, as well as those matters covered by our comment
2813 on Employees' Stock Syndicate.

"Our first investigation had to do with the responsibility for inadequacy of non-cancellable reserves. In this connection we took the sworn testimony of the Company's Actuary, Alfred Hann, which indicated that he repeatedly called Mr. Cochran's attention to reserve inadequacies and that no action was taken. In support of his testimony Mr. Hann produced letters written to Mr. Cochran regarding this matter together
2814 with Mr. Cochran's reply thereto. This investigation clearly indicated that not only did Mr. Cochran, then President of the Company, disregard the warning but thereafter consented to the payment of cash dividends to stockholders in amounts exceeding $5,000,000.00.

"We found through our investigation that numerous mortgage and collateral loans were made without first investigating the security, that in a number of cases the loans were made

2815 where certain executive officers or directors had a substantial interest in the borrowing corporation. In many instances the collateral securing collateral loans was stock of corporations in which certain officers were substantially interested. Many of these transactions were, in our opinion, in violation of Sections 1101 and 1104 of Article 17, Chapter I of the Insurance Code, State of California:

2816 "In addition to the above, we found instances of where amounts due on collateral loans were forgiven where the borrowers were personal friends or relatives of officers of the Company, as well as many instances where interest was reduced to a low rate without apparent justification.

"Many of these transactions were put through upon the direct order of an executive officer, and while members of loan committee protested, it did not prevent these transactions.

2817 "Nearly all of the investment transactions mentioned above were in violation of rules and regulations laid down for the governing of the investment policy of the Company.

"It is imperative that the present officers of the Company carefully study the information contained in the working papers of this examination, and take immediate action against those responsible for this condition."

2818 XXIV.

It is alleged upon information and belief that these statements are true. It is moreover alleged upon information and belief that nothing was done about any of these things by the management of the company up to and including July 22, 1935, when the company went into the hands of the conservator.

XXV.

2819 It is a fundamental principle that those who seek equity must do equity. Before any consideration is given to the stockholders under this plan, they should be required to restore to the company the $5,000,000 which they received in dividends, and if the company is insolvent then the decree and the plan should specifically provide in some appropriate manner that the stock of the new company shall be properly distributed
2820 to the non-cans, who are taking the risk of loss in the new venture entirely alone.

When a sufficient number of non-cans fall by the wayside on account of the unbearable burden imposed by the plan, the stockholders will benefit by their own wrong, and will probably interpose the statute of limitations to an action by the liquidator to recover these dividends which properly belong in the reserves.

2821 J. Neither The Stockholders, Nor Their Representatives, Nor Any One Of The Old Management Should Either Now Or In The Future Have Any Part Of The Management Of The New Company, And The Plan And Decree Should So Provide.

XXVI.

The plan should provide in some appropriate manner and the court should decree that the
2822 funds of this company should neither now, or in the future at any time be managed or handled by the old stockholders or their representatives, or any one of the old management.

Ample evidence is contained in the said Supplemental Report of Convention Examination of numerous irregularities in the conduct of the business of the company by many of the old management, and no opposition to it in the old
2823 management ever resulted in any action. The old management, those of whom were not worse, were either careless or ignorant and so far as can be ascertained no steps were ever taken to right the wrongs that were done. Any injustice that might possibly be done to any innocent party must necessarily be weighed against the necessity for both safety and absolute public confidence in the management of the new company.

2824 The sole responsibility for the old management is upon the stockholders, who controlled the company and who were comparatively few in number.

XXVII.

Annexed hereto and marked Exhibit B is an excerpt from said Supplemental Report which is made a part hereof and which fully indicates the practices which were engaged in, and the culpability of the entire management either for mal-
2825 feasance of those who were active and non-feasance of those who were passive. The resultant losses have never been appraised.

K. Plan of Non-Cans.

XXVIII.

Besides the modifications above urged in the plan of rehabilitation, there is annexed hereto, marked Exhibit C, a proposed outline of modifications to the plan of rehabilitation and reinsur-
2826 ance which will assure to the non-cans the ultimate ownership of the Pacific Mutual Life Insurance Company, which they are entitled to as above set forth. This plan may require some modifications or may have to be materially altered, but its main lines should be incorporated in the plan, even tho the new non-can company cannot be set up as a going concern but will have to remain in the hands of the Liquidator until it is restored to full solvency under the plan

2827 L. Additional Later Amendments To Plan.

XXIX.

The interveners reserve the right to suggest amendments to the plan other than those above set forth.

M. Occidental Life Insurance Company Proposal.

XXX.

The Occidental Life Insurance Company re-
2828 cently submitted to the Commissioner a proposed plan of reinsurance which involved the reinsurance of all policies on the basis set forth in the proposal. This proposal was summarily dismissed in a letter by the Commissioner without any attempt by the Commissioner to hold conference with the Occidental representatives to ascertain whether the Commissioner's objections to the proposal could be met or a compromise arrived at, altho the president of the Occidental
2829 has stated that he offered to visit the Commissioner to discuss it, and altho the plan in many respects offers greater protection to the policy holders than this plan, and a large and solvent insurance company. The Occidental Life Insurance Company, offered to have placed at least $3,000,000 additional capital into its own company, adding that much more capital behind the reinsurance contract in addition to its then capital, surplus, undivided profits and undisclosed reserve of about $3,000,000.

2830 XXXI.

It is submitted that under no circumstances should this plan in any form be finally approved until it is compared with the proposal of the Occidental Life Insurance Company, after every attempt has been made to induce the Occidental to improve its offer and meet the Commissioner's objections, and a liquidation order made so that it may be properly submitted.

2831 N. Summary and Conclusion.

XXXII.

The weak spots in this unfortunate company must now be exposed to the light of day. Any ostrich-like procedure now will only result in the future insolvency of the new company and a repetition of the present debacle.

There is a possibility that the new company as 2832 set up by the plan will have insufficient assets. This is true if, even on the reduced basis for non-can benefits, the actual value of the assets left for the non-cans (inclusive of the $3,000,000 capital and surplus) is not equal to the book value along the lines pointed out by the Commissioner in his letter of Sept. 18th to the Occidental. Only by present careful appraisal can this be ascertained. The plan must provide for immediate appraisals.

2833 In setting up a plan in which the life assets are trusteed, no judgment on the equity of the plan is possible until we find out the appraised value of the assets assigned. It may be that the worthless, doubtful and least promising will be left for the non-cans. From the condition of the collateral loans and the mortgages, the equity or inequity of the plan may much depend on the question. From the Convention Report it is per-
2834 fectly apparent that we can pay but scant attention to the book value of many of them.

The right of the non-cans to their share of the assets is disregarded by the plan. The non-cans are asked to surrender all their right to their pro-rata share of the assets to accomplish a reorganization, and to accept future profits in lieu thereof—to take a future profit and risk of loss instead of a present asset.

2835 Yet the provisions for the nonpar protection are so hedged in with exceptions and reservations that they afford them small protection with respect to the securing of those profits. The plan entirely loses sight of its main purpose—to salvage assets and restore non-cans, not to spend their money to build a vast business at the expense of non-cans for the future benefit of the stockholders. Even all non-par profits

2836 may be held by the board of directors for future anticipated losses on non-par life, altho adequate reserves are set up for them, and even if such funds go into the special fund available for corporate purposes.

And finally the amount available at any time for restitution of non-cans is subject entirely to the discretion of the board of directors, who, under the plan, are only obliged to devote the
2837 amount not reasonably required (in their sole discretion) for the reasonable, proper and profitable conduct of the business as a going concern. They may defer non-can obligations indefinitely into the distant future.

In other words, the fund to be created out of profits for the non-cans is not primarily hallmarked for them but to build up a great business
2838 for the stockholders, at the expense of the non-cans. The participating policy profits, constituting the greater part of the business, go to the present participating policy holders except as to the theoretical 10% thereof.

The fact that ultimately the profits will inure to the benefit of the non-cans is theoretically their protection—a mirage until liquidation.

2839 Nor are the non-cans, or indeed the life policy holders, accorded any representation whatever on the board of directors.

The company has its board of directors, and the Commissioner is not a member thereof. Under the law it, and not the Commissioner, will manage it, even tho his approval of their acts may be required.

2840 The unanimous support by the shareholders of this plan as against their bitter opposition to the previous plan is well founded.

They can foresee that the non-cans while taking the entire risk of the new venture get none of the profits after (theoretical and ultimate) restoration, and that the discouraged non-cans will drop out, either by the settlement route if

2841 they are in claimant because "hope / deferred long maketh the heart sick" or from actual dispair if they are not in claim, leaving the few remaining fully restored. The company will then go back to the shareholders free from most of the non-can claims and in full enjoyment of the fruits of what would amount to a legal fraud perpetrated upon the non-can policy holders.

We would have this anomalous result that the old stockholders, already having unlawfully

2842 profited to the extent of over $5,000,000 out of the coffers of the non-can reserves would, without present risk of any capital and without being required to make present restitution, have the company restored to them, free from liability to the greater part of the non-can policy holders, who will have thus lost to the stockholders the assets to which they only are entitled, having paid them in premiums to the old company.

And the same small group in control during
2843 this debacle will in the future be in control of the vast funds of the new company after demonstrated unfitness to handle them.

Wherefore, interveners and non-cancellable income policy holders pray:

1. That the petitioner's plan be *disproved* as submitted.

2. That it be amended in the respects indicated.

2844 3. That the proposed plan, Exhibit B, be accepted.

4. That the prayers of this answer be granted.

5. For such other and further relief as to the court may *beem* just in the premises.

H. S. DOTTENHEIM,
Attorney for Interveners and All Non-Cancellable Income Policy Holders Not Otherwise Appearing by Counsel.

2845 EXHIBIT A.

Extracts from:

Supplemental Report of Convention Examination of the Pacific Mutual Life Insurance Company of California as of December 31, 1935

Dated: July 22, 1936

States Represented: California, Louisiana, Ohio, Texas, Virginia and Washington

2846 "Real Estate owned, exclusive of Home Office property, consists of 92 parcels, of which number 64 are held by the Life Department and 28 by the Accident Department. Of this number 77 parcels were acquired by foreclosure subsequent to January 1, 1933,—51 by the Life Department and 26 by the Accident Department.

"The value of the real estate acquired by foreclosure, as carried on the Company's books, in-
2847 cludes not only the balance of principal, advances for taxes and insurance prior to foreclosure, taxes assessed prior to date of acquiring title, and cost of acquiring title, but also such items as premiums paid for title policies, and in a few cases, past due interest, pro-rated insurance premiums, amounts paid for furniture and fixtures and other items which should properly be charged to expense.

"Since the Company sets up a Contingency Reserve to take care of losses on real estate, as

2848 well as on other asset items, no appraisals were made of properties acquired by foreclosure. Of the total Contingency Reserve, we have allocated $730,000.00 to cover possible gross losses on individual parcels of real estate owned, and since no allowance has been made for anticipated profits on other parcels, this amount should be ample; $420,000.00 of this item is assigned to the Life Department and $310,000.00 to the Accident Department. Further comments as to allocation
2849 of a part of the Contingency Reserve to cover probable losses incurred from Mortgage Loans will appear under that subject. (p. 37)

Comment No appraisal was made. Hence no way of telling whether sufficient reserves carried.

"In the comments on mortgage loans in the report of the previous examination, it was remarked that 'the Company in several instances made mortgage loans to other companies and
2850 corporations, some of whose officers or directors are also officers and directors of this Company'. We remark briefly upon two such loans which have been foreclosed and are now carried in real estate.

"R. E. O. Ax 35, formerly M. L. Ax 991, is an unimproved lot at Long Beach, California, originally the site of a hotel which has since been demolished. The loan was first made January 14, 1925, for $375,000.00 to a corporation sev-

2851 eral of whose officers, directors and stockholders were also high executive officers or directors of this Company. The loan was increased, either by new notes or advances to pay taxes and other expenses, until on January 1, 1933, the balance outstanding amounted to $620,417.49. The interest rate, originally 6%, was reduced to 5% when the loan was renewed August 27, 1932, and to 4% on January 31, 1933, by action of the Executive Committee. One quarterly payment
2852 was made at this rate, February 28, 1933, and thereafter flat sums were accepted at intervals in lieu of interest due in considerably larger amounts. When the loan was foreclosed December 17, 1935, the principal balance, including advances, amounted to $669,301.08. In the process of foreclosure the Company secured a deficiency judgment for $41,181.76, which was compromised as of December 31, 1935, for $4,525.95, this amount constituting the sole remaining asset of
2853 the borrowing corporation. When the corporation was dissolved early in 1936, the Company owned 1486 shares of its stock, acquired, 998 by purchase and 488 from collateral loans, at a total cost of $44,901.70. After foreclosure expense and taxes assessed prior to foreclosure, amounting to $7,850.56, and after crediting the deficiency judgment of $4,525.95, the book value of this property as of December 31, 1935, was $672,625.59. By applying an interest rate of

2854 6% to the balance as of January 1, 1933, and to all subsequent advances, but without making an exact calculation, and after crediting to the resulting amount all interest actually received, we find that during the three-year period the Company suffered a loss in interest on this transaction of approximately $95,000.00. The Company's estimated sale price on this property is $572,000.00.

"R. E. O. 129, formerly M. L. 5754, consists
2855 of a lot in San Gabriel, California improved with a large brick, steel and concrete theater building and a one-story brick building. The loan was first made to the Mission Playhouse Corporation December 8, 1926, for $225,000.00 at 7% interest. The roster of the officers and directors of the corporation discloses that several of them were officers or directors of the Company. Without commenting upon the history of the loan prior to January 1, 1933, other than to say that
2856 it was in "hot Water" evidently for some years, the principal by that date had been increased by advances to $267,275.64. The Company acquired the property by grant deed dated March 6, 1933, in lieu of foreclosure. The advances and other expenditures which have been capitalized during the three-year period amount to $3 100.46, giving this property a book value as of December 31, 1935, of $270,376.10. Expenses for taxes, repairs, insurance, and other items, after

2857 deducting all rental income and other receipts, amounted to $20,946.89 during the three-year period, so that the actual cost is $291,322.99. There is a further potential loss of approximately $56,000.00, arrived at by applying the contract interest rate of 7% to the principal and advances outstanding on January 1, 1933. The Company's estimated sale price is $170,000.00, and it is doubtful, owing to the character of the improvements, if it can be sold at any time in the
2858 near future. While the corporation in this case was apparently organized for civic and patriotic purposes, and while the same reasons no doubt influenced the Company officials responsible for making the original loan, it is extremely difficult to believe that a loan of this character would have been made, had there not existed at the time the close relationship between the officers and directors of the Company and of the Corporation.

2859 "Assuming the Company's sale price as indicating a fair market value, on December 31, 1935 the actual or potential loss on the two properties including the loss from interest not received and the loss on stock owned in one of the corporations, is estimated at $418,000.00." (p 37 to 39).

Comment: The "previous report" referred to should be made available to ascertain the amount of these loans and the circumstances.

2860 "The company's investment in Mortgage Loans on Real Estate, consisting of 1,425 notes or series of notes, amounted to $88,379,312.85 as of the date of this examination." (p. 42).

"It cannot be said that the existence of interlocking directorates motivated the making of all loans shown above, but the making and servicing of certain of these loans clearly shows that excess amounts were loaned and concessions variously made, upon recommendations of such in-
2861 terested officers and/or directors. Interest reductions shown above do not reflect the true returns, as explained in a preceding paragraph, for in at least one instance, interest was accepted at the rate of 2½%. The aggregate loss to this Company by virtue of interest reductions and concessions to December 31, 1935 approximates $94,000.00. This however, does not take into account the fact that in the making of certain of the above loans interest was contracted at less
2862 than prevailing rates. It should be noted that the Company's largest individual loan, which stands at a principal balance of $2,210,000.00, is included in the foregoing schedule. It came into the Mortgage Account in 1935 through conversion of a bond issue owned by the Company and is secured by 32 improved properties variously located in the State of California. Simultaneously, with the making of the above loan, a loan of $2.000,000.00, also included in the fore-

going schedule, was made to the same corporation on 28 properties, also variously located in California, for the purpose of retiring a bond issue not previously owned by this Company. This was, in effect, a loan for $4,210,000.00, divided as indicated above. The security appears ample; however, the amount loaned to one corporation is large. The last Convention Examination Report called attention to the fact that such loans as shown in this schedule were made in contravention of the intent of the statute relating to loans to officers and/or directors, and it is regrettable to note that the practice was not at that time discontinued.

"The continuance of this practice is evidenced in the making of Mortgage Loan No. 7551, which came into the Mortgage Account in the principal amount of $250,000.00 on August 28, 1934, and was made for the purpose of paying off a mortgage loan owned by a corporation in which a director of this Company is president and principal owner. The debtor corporation in this transaction is principally owned by three officers and/or directors of The Pacific Mutual Life Insurance Company. Not only can this loan be criticised for the reasons above stated but it was made in violation of approved and adopted mortgage loan regulations which prohibits the making of such a loan on farm property, and at an interest rate of 5% which was at that time below prevailing rates.

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2866 "No such loans have been made since the present management came into power, and a further recurrence is not to be expected. In an effort to liquidate these loans, renewal and/or extension requests have been denied.

"A great deal of care is being exercised by the Mortgage Loan Department in conserving its interest in all loans. Because of the fact that in prior years investigation of underlying security was not made prior to commitments, nu-
2867 merous loans have either been taken into the Real Estate Account or have become troublesome to the extent of requiring constant supervision by the mortgage loan department. In all such instances the Company has exercised its rights under deed of trust provisions, collected all income by virtue of lease and rental assignments and otherwise supervised and managed these properties as fully as if actually owned as real estate.

2868 "A striking example of the mortgage loan department's handling of such cases is reflected in the history of Loan No. 7375, which stands at a principal balance of $1,488,894.49 and is secured by a subdivision in Los Angeles, California. The original amount of the loan was $830,000.00. The security evidently was not proper for such a loan at the time the commitment was made on March 18, 1930. It may or may not be significant that certain officers of this Company

2869 owned stock in the borrowing corporation at the time the loan was made. Subsequent to the making of this loan the Loan Committee in an effort to strengthen its position and to avoid foreclosure recommended the advancement of additional funds for development purposes and the Executive Committee gave its approval. For the past three years improvements have been made which include construction of a theater, two mercan-
2870 tile buildings, numerous multiple and single dwellings, street improvements and the acquisition of additional acreage with funds advanced by the Company. On December 31, 1935 the principal balance was allocated in the following manner:

Unsold lots	$ 728,710.00
Advanced for construction	271,586.50
Undeveloped acreage	147,538.83
Trust deed assignments	240,859.87
Sales contracts	100,199.29
	$1,488,894.49

2871

A fair appraisal of the security shows the loan to be well margined but principal recovery can come only through orderly liquidation as the debtor company is not financially able to service the loan. The Company is supervising and managing the sales program to the extent of setting sales prices, approving all sales and disbursing all funds received from both sales and rents. Practically all interest credited on this

2872 loan during the past three years was paid by the Company from funds provided, but unadvanced, when the loan was last renewed, increased and extended. No principal loss is to be expected, but a great deal of time can be charged to mortgage loan department supervision.

"Another example of the mortgage loan department's attempt to conserve the assets of this Company is fully explained in its handling of Loan No. 7689. The history of this item dates
2873 back to the purchase of a large amount of leasehold bonds issued by a Los Angeles club, which later defaulted in interest payments, as well as lease obligations. The Company, owning in excess of $600,000.00 of said bonds, in an effort to avoid a total loss, acquired fee title by purchase thereof and payment of $360,040.00 therefor.

"At the trustees' sale a member of the loan committee acting for the Company, bid in the
2874 outstanding bond security for $308,935.60. At the same time the Company directed the formation of a new club, into which were inducted members of the old club, advanced additional funds for the purpose of acquiring additional club property, and passed title of all property owned to the new club, which in turn executed notes and deed of trust in favor of this Company.

2875 "A detail of items comprising the present loan in the amount of $1,263,000.00 follows:

Fee title to land purchased	$ 360,040.00
Leasehold bonds owned	621,000.00
Purchase price of bonds at trustees' sale	308,935.60
Accrued interest on bonds	17,664.00
Advanced for purchase of additional property	125,000.00
Unadvanced funds	16,660.40
2876	1,449,300.00
Credit on bonds owned	186,300.00
Amount of note	$1,263,000.00

"In order to receive the cooperation of the old club officers and members, the Company recognized certain unsecured notes to banks amounting to approximately $252,000.00, by allowing interest to accrue thereon at 4%, the same rate
2877 the Company's notes provide. Although this loan is physically well secured, interest payments and principal reductions are contingent upon successful management by club officers as the security is a one-purpose building. The files reflect efficient handling of this difficult problem.

"Loans numbered 7121, 7184, 7275, 7450, 7491, 7569, 7765, although not requiring the time and attention as the loans previously discussed, are giving the mortgage loan department a great deal of trouble of the same nature. The

2878 aggregate principal balance of these loans, including numbers 7375 and 7689, is $6,261,463.40. Members of the loan committee have successfully worked out similar investment problems and your Examiners are of the opinion that these are being efficiently and intelligently handled.

"Four loans in the aggregate amount of $217,818.21 were in process of foreclosure as of the date of this examination and the company has acquired title to real estate of a book value of
2879 $852,491.95 to June 30, 1936. The above loans and properties foreclosed thus far in 1936, in the most part, occasioned the mortgage loan reserve carried on the liability page of this report. The Company will undoubtedly take title to other loan security prior to December 31, 1936.

"Loan No. 7201 to which attention was invited in the report of the last convention examination, with the statement that it should have been fore-
2880 closed prior to December 31, 1932, is still in the mortgage loan account and now stands at a principal balance of $401,752.32. The Company has had the benefit of all income from the property, for the past three years but said income was not suffisient to pay current expenses; therefore, no interest could be collected for the period. Your Examiners can see no reason for further delay in taking title to the property and exercising rights under a $40,000.00 personal guarantee.

2881 "A majority of trouble loans came into the mortgage account by commitments of loan amounts and terms before proper investigation of the security was made and before being submitted to the loan committee. The files reflect numerous instances of this irregular practice. The files also indicate that in the making of certain loans for construction purposes the borrower was required to purchase materials from, and to place fire insurance with firms designated
2882 by an officer who was at that time in charge of the mortgage loan department.

"Loan No. 7760, standing at a principal balance of $1,302,786.36 on December 31, 1935, was made after such requirements had been met. This loan was made on June 28, 1927 for $1,350,000.00 to mature August 28, 1947 and to bear interest at 6%. As in many instances the appraisal was made to show a 50% loan in order to comply with statutory requirements. On Feb-
2883 ruary 28, 1932 the loan was renewed and extended to August 28, 1949 and the interest rate reduced to 5½% with the notation that it should be collected at the rate of 5% to August 28, 1934. The loan immediately became delinquent and in the latter part of 1934 the mortgage loan department entered the picture and assumed supervision of management in its entirety. The Company agreed to make additional advances for specific changes and improvements on July 1,

2884 1935, at which time the loan was again renewed and extended to July 1, 1955. The interest rate was again reduced and the deed of trust now calls for interest to be paid at the rate of 4% for two years; 4½% for the next three years and 5% thereafter. All terms of the last renewal agreement are being met promptly. The Company not only suffered a loss of interest, but a great deal of expense was incurred before the loan was finally put in good standing.

2885 "During the depression years the Company made it a practice when renewing and extending loans to provide funds and hold same in anticipation of future delinquencies. This practice in some instances served to increase these excessive book values and at the same time show interest currently paid which would have otherwise been delinquent. This practice has now been discontinued.

2886 "The Company keeps currently informed as to the status of taxes on security covered by its trust deeds, and in instances where the mortgagor is unable for any reason to make such payments the money is advanced, and charged to the principal balance of the loan, and in most instances draws interest at the same rate as the original loan. The total balance of advances for taxes and other necessary expenses on December 31, 1935 amounted to $288,694.69 in the life department and $118,427.47 in the accident and health division.

2887 "The Company's experience in sub-division and institutional loans has been unfavorable, as a result, the present loan committee has gone on record as opposing the making of any such loans in the future.

"A definite policy of placing actual values on properties for the purpose of making new loans had its advent at the time the present loan committee gained full control over such matters.

"The reserve for mortgage loans losses shown
2888 on the liability page in this report was determined by a careful check of individual loans and is allocated to departments in the following manner:

Life	$1,022,724.94
Accident and Health	130,000.00
	$1,152,724.94

In instances where appraisals were found to be excessive the value of loan security was deter-
2889 mined from reported income, as nearly as possible. It is recommended that all appraisals be brought up to date." (p. 48 to 54)

"Collateral Loans. The rate of interest charged on collateral loans has been consistently lowered during the past three years, due apparently to changes in economic conditions, and in a number of cases it was found that the Company would accept compromise settlements of interest at the end of the year, in order to avoid showing past due interest in its annual state-

2890 ments. This latter practice, if there is any possibility of eventually securing payment of the past due interest, cannot be commended.

"In the report of the 1932 examination of the Company, the examinors commented upon the fact that in several cases, amounts had been written off of loans when renewals were secured, and the old notes returned to the borrowers, who were thus relieved of further obligation on the portion not included in the new notes. The ex-
2891 aminers further stated that 'it may therefore conceivably eventuate that a borrower would, on an advancing market, be placed in a position to extinguish his obligation to the Company and receive the balance upon disposition of collateral security, notwithstanding the fact that he actually owes the moneys to the Company'. Although this conclusion has been amply justified by succeeding developments, the Company has continued the practice during at least the first
2892 two years of the period covered by the present examination.

"In analyzing this feature, loans which have been retired by the Company taking over the collateral security have not been considered, as in such cases the amount written off would not affect the eventual recovery. It was found, however, that among the loans paid in cash and the collateral returned to the borrower, that the sum of $43,078.97, including $847.25 written off

2893 prior to January 1, 1933, has been lost in this manner, with no hope of future recovery from the borrowers, the notes having been returned to them. Included in the same catagory is $16,003.93 which has been charged off of loans which still remain unpaid. The sum of these two items, $59,082.90, has disappeared entirely. To mention two particularly arresting examples, on Loan No. 2939, $31,826.72 was charged off from the unlisted portion in 1933, and on Loan No. 2942,
2894 $5,000.00 was charged off in 1935, in the latter case upon an agreement with the borrower that he further reduce his loan by a cash payment of $2,500.00. Both loans, except the amounts charged off, were paid in full in 1935, and in each case the amount returned to the borrower in cash or securities, in excess of the balance discharged, was more than double the amount previously charged off. While it is not believed
2895 that such practice will continue in the future, due to a change in management and policy, it is impossible to pass over this phase without well merited criticism. Especially in view of the comments contained in the report of the previous examination, the actions of former high executive officers and directors in ordering or condoning charge-off of loans or compromise settlements of interest cannot be too severely condemned.

"It is interesting to note that of the 114 loans discharged during the three years covered by

this examination, 52 were paid in cash, 57, including 4 previously carried in unlisted assets, by release of the collateral to the Company, or by sale of the collateral at public auction with the Company as purchaser, and 5 by direct or indirect transfer to mortgage loans. Since the Board of Directors of the Company, by resolution passed on August 14, 1933, decided to make no more collateral loans, only two new loans have been made during the three-year period. One loan for $44,000.00 was transferred to mortgage loans in 1934 and was returned to collateral loans in 1935 in the reduced amount of $43,000.00." (P. 56-57)

"It was stated in the report of the last examination that a large portion of the stocks appearing among the collateral were those of local enterprises in which officers of this Company carried substantial interests. It might have been added that in addition to the officers, directors who were not officers also carried substantial interests in corporations, the stock of which were held as collateral. We found no appreciable change in this condition, either in loans discharged during the period under review or in those still on the Company's books at the end of the period, except that many of these stocks have been taken over in discharge of loans and now appear in the Company's investment portfolio. In practically all cases, stocks of the

2899 character referred to constituted the sole security of loans made to Company employees, and in a majority of these, it became necessary for the Company to take over the stocks, usually at a loss, in discharge of the loan.

"On the loans unpaid on December 31, 1935, other than as already stated, direct or indirect connection between the borrowers and present or former officers and directors of the Company appeared only in two instances. Loan No. 2916,
2900 which is still under water but which now shows signs of considerable improvement due to appreciation in some of the collateral, was made to a company whose president was for several years a director of the Pacific Mutual.

"Loan No. 2967 was originally made in 1930 to pay off the balance of a personal loan to a director and former vice-president of the Company, who was for some years president and in effect owner of the borrowing company. While
2901 the files do not disclose any definite official relation between the said director and the borrowing corporation at the present time, it is evident that some relationship has always existed, as he appears consistently in the correspondence. The collateral security for this loan was sold at auction in April 1936, by the Company, which bid in most of the collateral, taking a loss of approximately $54,000.00. The Company may possibly recover about $5,000.00 for a second

lien on real estate held as part of the collateral, the Company holding the first lien, and it is also possible that some of the stocks taken over may appreciate in value, this statement being based on balance sheets exhibited to the Examiners. This loan illustrates the decline in interest rates, remarked upon above. Originally made at 6¼%, the rate was decreased to 6% and later to 5%, both changes occurring in 1931. For the years 1932, 1933, 1934 and 1935, the interest returns were approximately 2.48%, .47%, .72%, and .62% respectively, and such interest as was received during this period was derived almost entirely from dividends on stocks held as collateral. Since the latter part of 1935, interest has apparently been waived, and all income from collateral security has been credited on principal.

"Although some of the transactions briefly referred to in this report merit the most severe criticism, it is the opinion of the Examiners that, in view of the change in management in 1935, there will be no recurrence in the future, the files examined indicating that the Company's present officers are clearly cognizant of the situation and that they are making sincere efforts to apply effective remedies. As an illustration of this, it was found that upon one loan in particular the Company would renew the note only upon an advance in the interest rate from 4% to 6%, later compromised at 5%. The loan

2905 was not renewed, being paid off in cash. Unfortunately, such severe measures might ultimately result in the closing out of adequately secured loans, leaving on the books only such under-secured loans as could not be placed elsewhere." (p. 58 to 60).

Extracts from:

Report of Convention Examination of the Pacific Mutual Life Insurance Company
of California
2906 as of December 31, 1932

Dated: May 20, 1933

States Represented: California, Michigan, Montana, Oklahoma and Oregon.

"The Pacific Mutual Employees Stock Syndicate: On February 11, 1918, employees of the Company associated themselves in the organization of a syndicate toward the acquisition of the
2907 corporate stock of the employing corporation. Gradually the activities were expanded to the point where nine pools were in effective operation within a decade, five of which covered the stocks of other corporations. All of these pools were eventually consolidated under the designation, 'The Pacific Mutual Employees Stock Syndicate.'

"The plan involved the creation of a trust directed by three officers of the Company, the purchase of stock in the open market, its assign-

ment as collateral security to the banking institution which provided the operating funds and distribution to subscribers upon discharge of contracted obligation. On December 31, 1932, the Security-First National Bank held the Syndicate's promissory notes aggregating an unpaid balance of $952,362.22 and secured by corporate shares at a market value ascertained as of that date of $618,185.69.

"During the three year period under examination when the market value of the collateral was no longer adequate to support the loan, the Company's directorate authorized contributions to Syndicate to an aggregate of $480,872.72. In the Company's annual statement the expenditure was reported in the Life and Accident departments under the following items:

Salaries	$171,331.21
Miscellaneous	304,433.32
Investigation of Claims	5,108.19
	$480,872.72

"Your examiners have received a letter from the General Auditor of the Security-First National Bank of Los Angeles in which he states, 'The notes are not endorsed by the Pacific Mutual Life Insurance Company nor do we hold any agreements with that Company with respect thereto'.

2911 "The contributions in question were not applied towards a reduction of the individual employee's original obligation to the bank but toward augmentation of the collateral and consequent increased Syndicate obligations represented by straight purchases of additional corporate stock, open to speculative assumption of market support.

"In view of the plan of the Syndicate, we question whether the Company was warranted in
2912 making these contributions. If the Company considers additional compensation should be paid to certain employees who have subscribed to the Syndicate, such additional compensation should depend on the value of the individual employee to the Company.

"These contributions may have been justifiable from the standpoint of the body of stockholders, but in that event, we feel no part of the sums disbursed should have been charged to the par-
2913 ticipating policyholders, particularly not during a period when it seemed expedient to reduce policyholders' dividends. The examiners recommend that the sums charged to the Participating section on account of the contributions to the syndicate be restored by charging the entire contributions to the Non-Participating section and the Accident and Health Department. While the amount of loss involved in connection with the Employees' Stock Purchase Plan, during 1932,

2914 was comparatively small, it would seem proper that the portion thereof treated as an expense of the Participating section be likewise so restored." (P. 14 and 15)

"The review of the loan files revealed that the Company in several instances made mortgage loans to other companies and corporations, some of whose officers or directors are also officers or directors of this Company. On loan number 5375, it appears that the President, Vice-Presi-
2915 dent and Treasurer of the borrowing corporation are Vice-President, President and Treasurer, respectively, of this company. From the correspondence in the loan file it appears that the loan was first made to a 'dummy' and subsequently assumed by the borrowing corporation.

"Under loans number Ax 991, 6121, 6720, 7001 and 7182, at least one officer or a director of the borrowing company is an officer or a director of this Company. The foregoing loans
2916 appear to have been made in contravention of the intent of the statute relating to loans to officers or directors.

"The Company has been recently following the practice of increasing the principal amounts of certain mortgage loans where, in the opinion of the investment department, the appraised value of the property justified such increases.

"On loan number Ax 991 the Company has agreed to advance a total of $265,000.00 in addi-

2917 tion to original loan of $535,000.00, primarily for the purpose of demolishing the present building and the erection of proposed improvements. As of December 31, 1932, there had been absorbed out of this additional commitment an aggregate of $85,417.49, segregated as follows: Taxes $13,278.76, interest $24,223.70, miscellaneous $3,915.03, and direct to the borrower, $44,000.00. This action, possibly justified by motives of investment protection, is open to pre-
2918 viously voiced reflection with respect to interlocking directorate interests.

"On loan number Ax 734, there had accrued an interest obligation of $42,685.65. The loan was increased by $45,000.00 merely to meet said interest charges. Without definite effect on the asset item, the transaction tends to disturb the reporting information concerning items of interest in default". (p. 34-35).

"Collateral Loans: A thorough examination
2919 was made of the individual loans consisting of a detailed analysis of the notes, (both in the regular schedule and those carried as unlisted assets), a physical check of the collateral security, review of the correspondence files, and verification of the card records which reflect the current status of each loan.

"We have determined that many of these loans are without adequate collateral coverage. While the correspondence files covering a majority of the loans do not contain all the desired informa-

2920 tion to determine the reason that loans of this character were permitted to continue where the market prices covering the collateral security were on the decline, there is sufficient evidence available to indicate that the executive committee and members of the board of directors were continually conversant with the situation. However, regardless of the attention which may have been given these loans, there is every indication that the Company failed to adopt at the proper
2921 time the obvious remedies to protect its interests.

"In view of these circumstances the Company, early in February of 1932, commenced writing down certain sums from the principal of the notes. In some instances the entire balance due on various notes was eliminated where the collateral security had a lower or no market value. In most cases, two separate notes were prepared and submitted to the borrower. One note was treated as a renewal loan, the amount being gov-
2922 erned by the market value of collateral security. The second note was made to cover the remainder of the obligation at the time of write off, carried as an unlisted asset partially secured by excess value of collateral held under original note. The sum written off, which represents the gross decrease by adjustment in book value, was $1,043,809.27. Of this amount, $929,493.28 applies to the 88 loans reflected in Schedule "X" of Unlisted Assets, as evidenced by the second note. A further analysis reveals the disappearance of

2923 the remaining portion of $114,306.99, $85,097.98 of which has been charged off to profit and loss or abated, under proper authorization." (p. 35-36)

"It must be remembered since the Company returned the original notes to the borrower in practically all cases where a renewal could be secured at time the loan was written down, that the borrower is relieved from further obligation on the portion not included in either of the two
2924 mentioned notes. It may therefore conceivably eventuate that a borrower would, on an advancing market, be placed in a position to extinguish his obligation to the Company and receive the balance upon disposition of collateral security, notwithstanding the fact that he actually owes the moneys to the Company.

"It seems to be of considerable importance to briefly mention *some* facts in connection with various loans. Some of the loans are of long
2925 standing and additional loans have been advanced from time to time with only occasional reductions in principal. In some instances the increased loan covered delinquent interest on the loan, or to meet capital stock assessments on holdings included in the collateral security on deposit. Although there is little information in the correspondence files to reveal how the loans originated, there were found numerous notations to indicate that additional loans and changes in interest rates were authorized by the President and the Execu-

2926 tive Vice-President. In July of 1931, a resolution was adopted whereby only the President was empowered with authority to approve a lower rate than 6% interest. Adjustments of interest rates were since made by the Executive Vice-President and it is deemed proper that the Board of Directors ratify the action which is apparently inconsistent with the resolution hereinbefore referred to.

2927 "A large portion of the stocks appearing among the collateral held is represented by issues in local enterprises in which officers of this Company carry a substantial interest.

"The excess of loans over market values of collateral in amount of $351,492.84 has been deducted under 'Assets Not Admitted'.

"Attention is invited to loan No. 2830 which stood at a balance of $25,000.00 as of December 31, 1932. This loan was originally made September 18, 1931 in the amount of $36,000.00 and the
2928 collateral security was represented by a group of various stocks. During October of 1931 the loan was increased to $38,500.00. In 1932, payments on account of principal amounting to $3,500.00 reduced the loan to $35,000.00 and a write off of $13,000 left an unpaid balance of $22,000.00. An additional loan of $3,000.00 was subsequently made and the two amounts combined into one note in the sum of $25,000.00. There is no information in the files to justify the loan follow-

2929 ing the write off and the action appears entirely unwarranted.

"Collateral loan No. 2739 in the amount of $897,000.00 as of December 31, 1932, represents the present unpaid balance of a combination of two loans originally negotiated by a borrower for $600,000.00 and $200,000.00 respectively.

"The $600,000.00 loan was originally secured by a mortgage on 480 acres of land, which land was leased to the City of Los Angeles during 2930 1928 for an airport for a period of fifty (50) years at a rental of $7,800.00 per month. In December 1930, the borrower caused $1,000,000.00 of 6% bonds to be issued on this property. The entire bond issue was substituted for this particular loan and the mortgage released. The $200,000.00 collateral loan was secured by 3525 shares of capital stock of local enterprises.

"In 1931 the two loans mentioned above were combined with an additional increase of $100,000.00 2931 making the entire loan $900,000.00, secured by some collateral and covered by policy of title insurance in favor of Trustee certifying the validity of the lease on the airport.

"Aside from the obligation to this Company, the original borrower had debts owing to two other local enterprises with which officers of this Company were affiliated, aggregating $208,842.00 as evidenced by promissory notes collaterally secured. In effect, the collateral so held by the

Pacific Mutual, in addition to furnishing security for its loan of $900,000.00, also provides security for the $208,842.00 owed to others.

"By an agreement dated November 27, 1931, the Controller for the City of Los Angeles was authorized and directed by the present borrower to pay all of the monthly rentals when due to this Company, commencing with the installment due January 1, 1932. The apportionment of such rental was agreed upon as follows:

(A) Interest due on note of present borrower to this Company.

(B) Payment of $1,500.00 per month account of principal of note above described or any renewals or extensions thereof.

(C) Payment of $1,000.00 per month account of principal of notes owed to other enterprises by original borrower.

(D) Delinquent interest, if any, on the outstanding indebtedness to these other enterprises by original borrower, provided claims are filed with this Company.

"The bonds issued by the present borrower are first mortgage six per cent serial gold bonds, dated December 15, 1930, in denominations of $1,000.00 each with definite quarterly maturities until retirement in 1945. Twenty-six Thousand

Dollars ($26,000.00) of these bonds matured and were retired during 1932. Since the bonds mature in increasing amounts annually and the sums retired in any one year exceed the portion of monthly rentals allocated direct to the Company on account of reduction of principal of the note, it is obvious that a gradual impairment in collateral security eventuates as bonds mature and are turned in for cancellation in excess of the loan reduction of $18,000.00 per annum.

"Since the remainder of the rental revenue, after all distributions are made as provided in items A, B and C of agreement, is returned to the borrower, the Company should, in view of prospective impairment of collateral security, arrange to revise the agreement so as to enable it to retain the entire balance left after application heretofore mentioned.

"Liberal test checks were made of the interest calculations covering all loans and the written record maintained currently on such cards was properly verified. While some entries were inconsistent with written authorization, it was ascertained that they were made pursuant to oral instructions and proper ratification should be recorded. It is further recommended that the correspondence files covering each loan be amplified

to incorporate all available information applicable thereto.

"In course of the verification of card records, it was ascertained that a few loans reported in existence on December 31, 1932 were paid in full during 1933, while of those included among the unlisted assets, two were paid in full and payments were made on others.

"Although the Company had applied 'convention' valuation to its collateral securities, we have established actual market values as of December 31, 1932 and deducted the excess of loans in amount $351,492.84 under assets not admitted.

"An additional sum in amount of $275,000.00 is included in the contingency reserve to provide for any future detrimental fluctuations.

"We cannot escape the conviction that the disproportionate losses sustained in this form of investment are, in a great measure, due to an over optimistic attitude on part of the management coupled with particular anxiety to protect the borrowers. Had the Company followed its usual conservative policy substantial losses might have been avoided. It might well be considered that, aside from the preservation of friendly relations with borrowers, the management may have thought it inexpedient to give additional impetus to an already much disturbed general financial situation!" (p. 36 to 38).

2941 EXHIBIT B.

Plan of Reorganization Submitted on Behalf of Non-Cancellable Income Policy Holders

* * * * *

One additional company is to be set up; the new Pacific Mutual Life Insurance Company will be called the Life Company; and the Pacific Mutual Holding and Liquidating Company to be set-up will be called the Non-Can Company.

2942 Following each paragraph will be a very brief explanatory note outlining the principal idea underlying the proposed item.

I.

The Life Company to follow the present lines with appropriate modifications as indicated in the answer, except that

(a) All provisions in the Commissioner's plan not customarily inserted in set-ups where life insurance company stock is sold to conserva-
2943 tive investors shall be eliminated from the agreement.

(b) This shall include the entire elimination of the provision with respect to mutualization.

(c) It shall include provision for a present appraisal of all assets.

The Life Company should be unhampered by restrictions and conditions at which competitors may shoot. All doubts as to the value of its assets should be promptly removed.

2944 Its structure should be simple so that he who runs may read.

It should be in such situation that

(a) it can readily reinsure without prejudicial delay; (b) it can be ready for consolidation with other insurance companies without structural change and without the trading handicap of unusual restrictions and obligations outside its functions as a Life Insurance Company.

2945 (c) It should be ready to receive new capital through underwriting at any time without fundamental modification of its corporate structure or its contractual relations.

It is believed that there will be no difficulty under these conditions in securing an underwriting of a preferred issue of from $10,000,000 to $15,000,000 as soon as the Life Company is so set up and hence in shape to be truly rehabilitated.

2946 II.

The Non-Can Company shall be set-up with an authorized capital sufficient to restore all impairment of non-can reserves and provide adequate working capital. The company will be strictly a holding company and a liquidating company and will write no new insurance.

This company will assume the non-cancellable income policies substantially according to the Schedule provided in the Commissioner's plan hereafter provided, but will, as stated, write no

2947 new non-can business. It may have to remain in Conservatorship for a time.

It will assume administration expenses and claims as set forth in the Commissioner's plan, modified as indicated by the answer.

The non-can business of the Non-Can Company shall be serviced by the new company on a service charge basis.

The Non-Can Company will also be a Holding Company for all the stock of the new company
2948 as hereafter outlined and the dividends on this stock will go into the Non-Can Company's treasury.

III.

Transfer of Assets to the New Company.

To the company shall be transferred:

(a) All reserves with allocable assets other than life reserves and the capital and surplus of the Life Company.

2949 This will leave the Life Company in good condition with its full life reserves and its full capital and surplus of $3,000,000

(b) The entire capital stock of the Life Company. It is believed that under this plan the value of this stock in the Life Company will somewhat offset the contributions by the noncans of their share of the life reserves to the life policy holders, and their surrender of the noncan pro-rata share in the assets of the Life Com-

2950 pany, and that future dividends on this stock go into the non-can reserves.

The entire capital and surplus of the new company was all contributed out of the non-can reserves, and its equivalent in stock belongs in the assets of the Non-Can Company.

(c) All causes of action against directors, stockholders and for damages for misfeasance and non-feasance.

IV.

2951 Adequate Reserves to Be Created:

The Commissioner shall after appraisal of all assets then determine what additional sum is required to create adequate reserves for the non-can policies, which shall be entirely or partially restored as hereafter stated.

V.

Disposition and Sale of Capital Stock of the Non-Can Company:

2952 To raise this sum and supply adequate working capital, the capital stock of the company shall be disposed of as follows:

(a) All of the stock of the Non-Can Company shall be issued to voting trustees under a trust agreement, the duration of which shall be ten years. The voting trustees shall be three (3) in number; one to be selected by the non-can policy holders, acting thru their attorney in this action in their behalf, but to be replaced by the

2953 vote of a majority of the non-can policy holders at any time; the second to be the Insurance Commissioner, or his nominee; and a third trustee selected by the court.

(b) The voting trust certificates shall be offered for sale at such price as will wipe out all impairment of non-can reserves and provide adequate working capital.

(c) The voting trust certificates shall be offered to the non-can policy holders in proportion to the reserve to be actuarially set up for
2954 their respective policies. Each non-can policy holder shall have the following options:

1. To subscribe to his *alloted* share.

2. To accept a raise in premium to enable him to pay the company the equivalent of the price of the voting trust certificates *alloted* to him in ten (10) years at the end of which time upon full payment, his voting trust certificates shall be delivered to him.

2955 To protect each policy holder and the Non-Can Company in case of death of any policy holder before he shall have paid for his stock, it shall take out group term life insurance in the Life Company to the extent of the unpaid subscriptions on the group lives of the subscribing policy holders.

The old company is at present apparently insolvent to the extent of $17,000,000.00. This insolvency is wholly falling, under the present

2956 plan, on the non-can policy holders, whose reserves, besides being impaired to this extent, have contributed out of the remaining reserves the entire capital stock of the new company, which in equity belongs to them, as do the remaining reserves.

The entire interest in the company of the stockholders has been wiped out by insolvency.

The stockholders have no equity in this company. On the contrary they have received over
2957 $5,000,000.00 to which they are not entitled and which properly belongs in the non-can reserves, and which should be restored by them as a condition precedent to any consideration to their alleged claims.

By surrendering, then, their share of the assets of the life reserves to the life policy holders and contributing its capital, the non-can policy holders have a paramount equity in the profits of the new company.

2958 "They, and only they, are contributing out of the assets which belong to them the capital, surplus, and a large amount of assets taken into the new company for life reserves, and there is no reason in law or common sense, since they are as a class presently taking this enormous loss, why they should not have all of the profits. In the event of the insolvency of the new company, the entire loss will fall on the non-can policy holders.

2959 If the stockholders of the company wish to step into these shoes, they can only do so by assessing themselves as indicated.

(e) If any non-can policy holder fails to accept either option offered him, and elects to continue paying only his present premium, and if the stock offered to him remains unissued, a lien shall be created against his policy to the extent that he shall not be entitled to have consideration in reserves against his policy created thru con-
2960 tributions under the plan by non-can policy holders.

VI.

Assumption by the New Company of Non-Can Policies:

The Non-Can Company, except as in Paragraph V, sub-paragraph (e) provided, shall assume all non-can policies and claims thereon as follows:

2961 (a) Immediately on the schedule as provided in the so-called contract of rehabilitation of July 23, 1936 to be modified in accordance with this set-up and as agreed by the Commissioner of Insurance.

(b) As soon as the stock shall be fully subscribed, the provisions of (a) shall cease, and the non-can policies shall be fully assumed although losses would be payable only out of funds received with the exception before noted.

(c), If the stock is not fully subscribed, the company shall have its reserves readjusted each six months by the Insurance Department, and the benefits properly distributed to the policy holders, except as otherwise herein provided.

VII.

Plan Self-Operative:

Either the policy holder accepts the plan in toto (and subscribes to his stock or not, as the case may be) and thereby becomes a policy holder in the Non-Can Company, or files a claim and proves his damages.

VIII.

Dividends:

Dividends on the stock of the Life Company will be available to restore the non-can reserves, with due regard to their rights. Each dividend will increase the value of the Non-Can Company stock, and appropriate provisions for requirement of distribution to non-can policy holders can be made.

IX.

Management:

The voting trust provision assures a management satisfactory to the court and the Insurance Commissioner.

X.

Working Out of Plan:

The new contract must be worked out in conference with counsel to the Insurance Commis-

2965 sioner. It cannot be drafted in advance of the court's ruling on various points raised by the answer.

XI.

Ratification by Policy Holders:

In view of the 100% restoration of life policy holders, their assent will not be required. The contract to be drawn should require the affirmative vote of 51% of the non-can policy holders 2966 who *chose* to vote.

XII.

Modifications:

This plan, if preserved in its general scope, may be modified in the respects in which it does not meet with the Commissioner's approval.

Note: This plan, with modifications, has been previously submitted by Mr. H. S. Dettenheim 2967 and Mr. Ben Hunter who joined in its preparation to the Commissioner.

Verified.

Endorsed: Received copy of the within answer this 6th day of October, 1936. U. S. Webb, Attorney General.

Filed Oct. 6, 1936. L. E. Lampton, county clerk: by R. J. Curtis, deputy.

2968 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of The State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent; Pacific Mutual Life Insurance Company, intervenor. No. 404,673.

Return of Vernon Bettin and William George Dickinson to Order to Show Cause.

2969 Come now Vernon Bettin and William G. Dickinson, policy holders and persons interested in the above entitled proceedings and file through their attorneys, Bettin, Painter & Wait, this their return to the order to show cause issued by the above entitled court on the 25th day of September, 1936, and their objections to the proceedings in said cause as follows:

I.

2970 That at all times herein mentioned, objector, Vernon Bettin, was and now is the owner and holder of Non-cancellable Income Policy Number 4661809, issued by The Pacific Mutual Life Insurance Company of California, the respondent above named; that all premiums due upon the policy aforesaid have been paid and said policy is now in full force and effect.

That at all times herein mentioned, objector, William George Dickinson, was and now is the owner and holder of Non-cancellable Income

2971 Policy Number 4642314, issued by The Pacific Mutual Life Insurance Company of California, the respondent above named; that all premiums due upon the policy aforesaid have been paid and said policy is now in full force and effect.

II.

Objectors object to the

a. Ratifying, confirming and approving of the account of the conservator as set forth in paragraph 1 of the order to show cause.

2972 b. Ratifying, confirming and approving the transfer and conveyance as set forth in paragraph 2 of the order to show cause.

c. Ratifying, confirming and approving a rehabilitation and re-insurance agreement as set forth in paragraph 3 of the order to show cause.

d. Authorizing and directing said conservator to transfer, convey, release, etc., as set forth in paragraph 4 of said order to show cause.

2973 e. Authorizing and directing the conservator fully and faithfully to perform, etc., as set forth in paragraph 5 of said order to show cause.

f. All matters set forth in paragraph 6 of the order to show cause.

g. All matters set forth in paragraph 7 of the order to show cause.

h. Ratifying, confirming and approving any and all acts, things or transactions performed, done or entered into by said conservator, as set forth in paragraph 9 of the order to show cause.

2974 and

i. Ratifying, confirming, / approving that certain order permitting the performance of acts and the making of payments necessary to conserve and protect assets and to prevent the waste thereof, dated August 17, 1936.

j. Each, every and all of the proceedings taken and had up to and including the issuance of said order to show cause on the 25th day of
2975 September, 1936, by the Honorable Henry M. Willis, judge of the above entitled court;

k. Each, every and all of the proceedings proposed to be taken and had in connection with the above entitled proceedings.

III.

The objections aforesaid are made upon the following grounds, to-wit:

2976 a. That said permission and order given with respect to said plan and agreement of rehabilitation is unlawful and void for the reason that no hearing of motion for said permission and order was had as required by section 1016 of the Insurance Code of the state of California;

b. That the proposed plan of rehabilitation is not the best possible plan for the protection of these objectors and other policy holders in The

2977 Pacific Mutual Life Insurance Company of California similarly situated;

c. That said plan, if adopted or approved by this court, will render the policy owned and held by these objectors practically worthless;

d. That said plan undertakes to substitute some fractional liability by the Pacific Mutual Life Insurance Company for the obligations of The Pacific Mutual Life Insurance Company of
2978 California to these objectors;

e. That said plan, if carried out, would constitute a violation of these objectors' rights under sections 7, 11, 13, 16, 21 and 22 of article 1 and section 1 of article 3 and section 1 of article 12 of the Constitution of the state of California, and also section 1 of the 14th amendment to the Constitution of the United States of America.

2979 IV.

These objectors object to any plan or scheme which would impair in any manner or way, the obligation of these objectors' contract with The Pacific Mutual Life Insurance Company of California.

V.

These objectors object to all proceedings and orders heretofore or hereafter made by the above entitled court in the above proceeding on the

ground that each, every and all of the laws and statutes upon which such proceedings or orders were based, are, and each of them is, unconstitutional and void.

VI.

Objectors object to each, every and all of the orders heretofore made in the above entitled proceeding on the grounds and for the reason that the true facts of the case could not and would not justify the making of said order.

VII.

Objectors hereby refer to the objections heretofore or hereafter filed by all other persons in a similar situation, and to complaints in intervention heretofore or hereafter filed by persons in a similar situation as these objectors in respect to the above entitled proceedings, and by such reference hereby adopt the said objections and said complaints in intervention of said persons and incorporates the same herein as a part of this return.

VIII.

Objectors hereby make demand upon the old Pacific Mutual Life Insurance Company, the new Pacific Mutual Life Insurance Company, and Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, that they and

each of them immediately furnish through auditors and appraisers, to be appointed by the court (1) a complete audit of the business and affairs of the Pacific Mutual Life Insurance Company covering the last ten years, with particular reference to the stock and other transactions participated in by any director, officer or employee or agent of the company, and (2) a complete appraisement of the assets of the Pacific Mutual Life Insurance Company held by the insurance commissioner, this appraisal to be made of the basic assets and not of the stock of either corporation.

Wherefore, these objectors pray that the objections hereinbefore taken to the proceedings in the above entitled matter be allowed and sustained and that appropriate orders be made by the above entitled court setting aside and vacating each, every and all of the orders heretofore made in the above entitled proceeding and restoring these objectors to the same status that they occupied before said proceedings were instituted.

BETTIN, PAINTER & WAIT,
By VERNON BETTIN,
Attorneys for Objectors.

Verified.

2986 (AFFIDAVIT OF SERVICE BY MAIL.)

State of California, County of Los Angeles—ss.

Ray H. Kinnison, being duly sworn, deposes and says:

That his business address is 1030 Rives Strong Building; that he is a citizen of the United States, and a resident of the county of Los Angeles; that he is over the age of eighteen years, and not a party to the above-entitled cause; that on the
2987 5th day of October, 1936, he placed a copy of the within return of Vernon Bettin and William George Dickinson to order to show cause in an envelope addressed to Mitchell, Silberberg & Knupp, 603 Roosevelt Building, Los Angeles, California, which is the office address of the attorney for the petitioners in said matter, sealed said envelope and deposited it in the U. S. mail at Los Angeles, with the postage thereon fully prepaid; that there is a regular communication
2988 by mail between the place of mailing and the place so addressed.

RAY H. KINNISON.

Subscribed and sworn to before me this 5th day of October, 1936.

(Seal) GERTRUDE R. KLEIN,
Notary Public in and for Said County and State.

Endorsed: Filed Oct. 6, 1936, 4:05 p. m. L. E. Lampton, county clerk; by M. Zimmerman, deputy.

2989 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404-673.

Order Amending Order Appointing Conservator and Restraining Order Nunc Pro

2990 **Tunc.**

This matter having come on for hearing on the objections of certain interveners to the order appointing conservator and restraining order made and entered herein on the 22nd day of July, 1936, and on motion of the Attorney General duly made in open court that the recital appearing in the order appointing conservator and restraining order entered on the 22nd day of July, 1936, and the order appointing conservator and

2991 restraining order entered on August 11th, 1936, through mistake, inadvertance and excusable neglect, did not correctly recite the facts that actually appeared to the court from the application of petition for an order appointing a conservator and restraining order; and

It appearing to this court that the application of petitioner for an order appointing a conservator and restraining order alleged facts sufficient for the issuance by this court of an order ap-

2992 pointing a conservator and restraining order and in all other respects conformed to the requirements of section 1011 of the Insurance Code of California, and that said orders appointing a conservator and restraining order entered herein on July 22, 1936, and August 11, 1936, should be so corrected that they recite the facts actually appearing to the court at the time petitioner's application for an order appointing a conservator and restraining order was presented and said
2993 orders of July 22, 1936, and August 11, 1936, were made and entered herein; and the court being fully satisfied in the premise.

It is therefore ordered that the order appointing conservator and restraining order made and entered herein on July 22, 1936, be and the same is hereby amended *nunc pro tunc* as of July 22, 1936, by striking therefrom the second paragraph reading as follows:

"The court finds that petitioner herein, to-
2994 gether with a number of other insurance commissioners of states in which respondent corporation transacts its business, made a convention examination of the business and affairs of respondent corporation as of December 31, 1935, and in connection therewith petitioner and said other commissioners have joined in a report of such examination, certified copy of which said report is attached to said application as Exhibit A thereof; that said examination and report and evidence shows and the court finds the fact to be

that respondent corporation is in such condition that its further transaction of business will be hazardous to its policyholders, its creditors and to the public; that said examination and report and evidence further shows and the court finds the fact to be that respondent corporation is insolvent within the meaning of article 13, chapter 1, part 2, division 1, of the Insurance Code of the state of California; that respondent corporation's said hazardous and insolvent condition is principally caused, among other things, by reason of the fact that respondent corporation has for a considerable number of years last past issued a large number of non-cancellable accident and health policies at a premium rate which was and is now entirely inadequate to maintain the reserves required by law to mature said policy obligations."

and by inserting in lieu thereof the following:

"It appearing to the court that said application is verified and shows that petitioner has found, after an examination of respondent by petitioner, that respondent is in such condition that its further transaction of business will be hazardous to its policyholders, its creditors, and to the public; and it further appearing to the court that said application is accompanied by a certified copy of petitioner's last report of his examination of respondent showing petitioner's finding that respondent is insolvent within the

meaning of article 13, chapter 1, part 2, division 1, of the Insurance Code of the state of California."

It is further ordered that the order appointing conservator and restraining order made and entered herein on August 11, 1936, be and the same is hereby amended *nunc pro tunc* as of August 11, 1936, by striking therefrom the second paragraph reading as follows:

"The court finds that petitioner herein, together with a number of other insurance commissioners of the states in which respondent corporation transacts its business, made a convention examination of the business and affairs of respondent corporation as of December 31, 1935, and in connection therewith petitioner and said other commissioners have joined in a report of such examination, which said report is petitioner's last report of examination of respondent, and a certified copy of which said report is attached to said application dated July 22, 1936, as Exhibit A thereof; that said application, examination and report, and each of them, shows and the court finds the fact to be that respondent corporation is in such condition that its further transaction of business will be hazardous to its policyholders, its creditors and to the public; that said application, examination and report, and each of them, shows and the court finds the fact to be that the respondent corporation is insolvent within the meaning of article 13, chapter 1, part 2,

division 1, of the Insurance Code of the state of California; that respondent's said hazardous and insolvent condition is principally caused, among other things, by reason of the fact that respondent corporation has for a considerable number of years last past issued a large number of non-cancellable accident and health policies at a premium rate which was and is now entirely inadequate to maintain the reserves required by law to mature said policy obligations."

and by inserting in lieu thereof the following:

"It appearing to the court that said application is verified and shows that petitioner has found, after an examination of respondent by petitioner, that respondent is in such condition that its further transaction of business will be hazardous to its policyholders, its creditors, and to the public; and it further appearing to the court that said application is accompanied by a certified copy of petitioner's last report of his examination of respondent showing petitioner's finding that respondent is insolvent within the meaning of article 13, chapter 1, part 2, division 1, of the Insurance Code of the state of California."

Done in open court this 8 day of October, 1936.

HENRY M. WILLIS,
Judge.

Endorsed: Filed Oct. 8, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

3004 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent; E. A. Conway, intervener. No. 404-673.

Complaint in Intervention.

Leave of court first being had and obtained,
3005 E. A. Conway, individually and as Secretary of State and *ex-officio* Commissioner of Insurance of the State of Louisiana, on behalf of all policyholders of The Pacific Mutual Life Insurance Company of California residing in the state of Louisiana who may wish to join with him in this proceedings, intervener herein files this his complaint in intervention and alleges as follows:

I.

That petitioner is named as the insured in and
3006 is the owner and holder of non-participating ordinary life policy #426129, dated May 3, 1921, in the amount of $10,000. issued by respondent corporation. That he is also named as the insured in and is the owner and holder of noncancellable income policy #4616854, dated April 26, 1921, providing for the payment of indemnity of $300.00 per month during the continuance of disability resulting from accidental means or sickness and consisting of a continuous total loss of business time, and the premiums hereto-

3007 fore coming due on each of said policies have been fully paid and on July 22, 1936, each of said policies was in full force and effect. That as Secretary of State and *ex-officio* Commissioner of Insurance of the State of Louisiana, he is the proper party to represent policyholders residing in said state who wish to join with him in this proceedings.

II.

That at all times herein mentioned the respond-
3008 ent, The Pacific Mutual Life Insurance Company of California, has been and now is a corporation organized, existing and doing business under and by virtue of the laws of the state of California, with its principal place of business in the city of Los Angeles, in said state, and hereafter in this complaint in intervention said corporation may be referred to as "old company."

III.

That on July 22, 1936, there were in full force
3009 and effect many thousands of life and accident and sickness policies including non-cancellable income policies issued by respondent corporation to residents of the state of Louisiana. That on the 22nd day of July, 1936, a proceedings entitled as above was commenced in the above entitled court by Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as petitioner, against The Pacific Mutual Life Insurance Company of California, as respondent, seeking the appointment of said commissioner as conservator of respondent corporation, and further relief.

3010 IV.

That said old company also did business under and by virtue of the laws of the state of Louisiana and that many people residing in the state of Louisiana purchased policies of insurance from such company and as all premiums heretofore coming due on each of said policies have been fully paid, on July 22, 1936, each of said policies are in full force and effect.

V.

3011 That prior to or on or about July 22, 1936, and for a period of to-wit: 68 years, said old company has been continuously engaged in the state of California and elsewhere in the business of issuing and selling life insurance and during a portion of that time, to-wit: for a period of fifty years immediately last past in the business of issuing and selling contracts and policies of health and accident insurance and that since on or about August, 1918, said old company has
3012 been issuing and selling non-cancellable contracts and policies of health and accident insurance.

VI.

That on July 22, 1936, said Samuel L. Carpenter, Jr., was by this court appointed conservator of respondent corporation. That thereafter and on said day, said petitioner filed herein his application for an order appointing him as liquidator of said respondent corporation. That immediately thereafter and on said day, said petitioner was by this court appointed liquidator of

3013 respondent corporation. That on said day and immediately after his appointment as such, said liquidator filed herein his petition for approval of rehabilitation, sale and transfer of assets and reinsurance plan and agreement, which said petition was on said day by this court granted and an order approving rehabilitation, sale and transfer of assets and reinsurance plan and agreement was entered herein.

VII.

3014 That thereafter said orders appointing liquidator and approving rehabilitation, sale and transfer of assets and reinsurance plan and agreement, were, upon good cause shown, vacated by this court. That on August 14, 1936, said Samuel L. Carpenter, Jr., petitioner herein, filed herein his further petition with respect to rehabilitation, sale and transfer of assets and reinsurance plan and agreement. That on said day this court made its order to show cause with respect to said
3015 rehabilitation, sale and transfer of assets and reinsurance plan and agreement. That no hearing on the return of said order to show cause has been had.

VIII

That intervener is informed that said petitioner has prepared and filed with this court a revised or amended rehabilitation plan of respondent corporation, and has also filed herein his petition for approval thereof. That a copy of said revised or amended rehabilitation and reinsurance agree-

ment is hereto annexed, marked "Exhibit A" and is made a part hereof by reference.

IX.

That the intervener is familiar with the provisions of said revised or amended rehabilitation plan. That it is fair, just and equitable to all classes of policyholders and all stockholders and creditors of respondent corporation. That it is not in violation of the Constitution of the United States or the Constitution and laws of the state of California.

X.

That the benefits to active life non-cancellable policyholders under said revised or amended rehabilitation plan are of a far greater value to each of such policyholders than would be the distributable share of the assets of respondent corporation to each of the members of such class of policyholders in the event of liquidation.

XI.

That said plan is now the only plan before the court for approval. That said plan is the result of a prolonged series of conferences between said petitioner and attorneys representing intervening policyholders, including life and non-cancellable policies, creditors and stockholders of respondent corporation. That intervener is informed and believes and upon such information and belief alleges that the delays necessarily incident to the formulating of another or different plan of rehabilitation of respondent or further revising or

amending said plan will cause great and irreparable damage to the estate of respondent corporation through the loss of agents, new business and the lapsation of active policies, and that the failure of this court to promptly approve said plan will cause great loss and irreparable damage to petitioner individually and to other policyholders in the state of Louisiana represented by said petitioner in his capacity as Secretary of State and *ex-officio* Commissioner of Insurance of the State of Louisiana.

Wherefore, your intervener prays:

1. That said revised or amended plan of rehabilitation of The Pacific Mutual Life Insurance Company of California be approved in accordance with the petition of said Samuel L. Carpenter, Jr., as conservator of respondent corporation;

2. That all objections to said revised or amended rehabilitation plan be overruled; and

3. For such other and further relief as to the court shall seem just and equitable.

Dated: Oct. 5th, 1936.

E. A. CONWAY,

E. A. CONWAY,

Individually and as Secretary of State and Ex-Officio Commissioner of Insurance of the State of Louisiana, Petitioner.

D. W. ELHSON, *Atty.*

Verified.

3022

EXHIBIT A

REHABILITATION AND REINSURANCE AGREEMENT

This Agreement, made and entered into as of the 22nd day of July, 1936, between Pacific Mutual Life Insurance Company, a California corporation, and Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as conservator of The Pacific Mutual Life Insurance Company of California, a California
3023 corporation,

Witnesseth:

That for and in consideration of the covenants and agreements hereinafter contained, the parties hereto agree as follows:

Definitions

(1) "Commissioner" shall mean Samuel L. Carpenter, Jr., in his capacity as Insurance Commissioner of the State of California, or his successors
3024 in office as such Commissioner.

"Conservator" shall mean Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, in his capacity as Conservator of The Pacific Mutual Life Insurance Company of California, or his successors in office as such Conservator.

"Old Company" shall mean The Pacific Mutual Life Insurance Company of California.

"New Company" shall mean Pacific Mutual Life Insurance Company.

3025 "The Court" shall mean the Superior Court of the State of California, in and for the County of Los Angeles.

"Non-Can Policies" shall mean those policies of the Old Company usually known as its "Non-Cancellable Income Policies" including the Aggregate form thereof.

"States" when referred to a governmental subdivision shall be deemed to include Territories and the District of Columbia.

3026 "Properties of the Old Company" shall mean all books, records, property, real and personal, tangible and intangible, and all other assets of every kind, character, and description whatsoever, and wheresoever situated, owned by the Old Company at the time of the appointment of the Conservator which shall not have been applied by him against his subscription for stock of the New Company or disposed of by him in the due course of his administration as Conservator, plus 3027 all property acquired by the Conservator and the income therefrom collected by him, except (a) the stock of the New Company held by him; and (b) rights or claims, if any, of whatsoever nature which the Old Company may have against any of the present or past officers, directors, or employees, as such, of the Old Company, or against any other person, firm, or corporation, by reason of or in connection with wrongful or illegal acts or omissions, if any, of any of the past or present officers, directors, or employees

3028 of the Old Company, including rights or claims on any fidelity or surety bond or bonds given to or in favor of the Old Company to secure the faithful performance by any of its officers, directors, or employees of any of their duties as such.

"Effective Date of this Agreement" shall mean July 22, 1936, at the hour of one o'clock P. M. Pacific Standard Time.

"Liquidator" shall mean any person hereafter appointed Liquidator of the Old Company in
3029 the proceeding now pending in the Court entitled "Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California vs. The Pacific Mutual Life Insurance Company of California", and bearing number 404673 in the records of the Court; and any person succeeding to the office of such Liquidator.

Transfer of Assets

(2) The Conservator agrees, by appropriate
3030 instrument of conveyance, to sell, assign, convey, release, transfer, set over, and deliver, to the New Company, the properties of the Old Company; and to execute any and all further documents or instruments as may be reasonably necessary to effectuate and confirm the title of the New Company thereto.

The Conservator shall not be required to make manual delivery of any cash or securities deposited by the Old Company with any governmental authority as a condition to the conduct of

its business, nor to make manual delivery of any premiums or other assets which are in the possession of receivers of the Old Company or its assets or business, or in the possession of other governmental authorities, in states other than California; but in connection with receivership or other proceedings in such other states, the Conservator shall do any and all things proper for him to do to bring about and accomplish the delivery and transfer of such premiums or other assets to the New Company.

The Conservator shall transfer and deliver to the New Company the full amount of all premiums on any policy reinsured and assumed hereunder which have been paid to the Conservator on or after the effective date of this agreement, and the New Company shall credit the holder of such policy with the payment of such premiums accordingly, subject to repayment as hereinafter provided in the event the holder of such policy shall elect not to accept such reinsurance and assumption by the New Company. If any policy holder of the Old Company whose policy may be reinsured or assumed hereunder shall have paid his premium thereon to the Conservator subsequent to the effective date of this agreement, and shall thereafter elect to reject reinsurance and assumption of his such policy hereunder; and if the Court shall direct the Conservator or Liquidator to return said premium (or the net premium or premiums less charge for insurance

service or collection charge or otherwise); then and in those events the New Company shall repay to the Conservator or Liquidator, on demand, said premium, or so much thereof as the Court may have ordered returned by the Conservator or Liquidator, as aforesaid. Pursuant to the provisions of Section 1043 of the Insurance Code of the State of California it is agreed that subsequent to the effective date of this agreement, and for such period of time as the Commissioner may determine, no investment or reinvestment of the assets of the Old Company shall be made without first obtaining the written approval of the Commissioner.

Reinsurance and Assumption of Policies Other Than Non-Can Policies.

(3) The New Company does hereby reinsure and assume, as of the effective date of this agreement, with the exception hereinafter provided, the liability of the Old Company and of the Conservator under all life, endowment, annuity and term policies and contracts of insurance, and all other policies and contracts of insurance, including, without limiting the same to, health and accident benefits, waiver of premium disability benefits, permanent and total disability benefits, home office employees disability benefit plan, and all supplementary contracts, annuity contracts, and all reinsurance contracts, issued or assumed by the Old Company and outstanding and in

force on the books and records of the Old Company at the effective date of this agreement, or issued by the Conservator in his name as Conservator, in the name of the Old Company, or in the name of the New Company, subject, however, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against said policies or contracts or against any claims and actions thereon, which would have been available to the Old Company or the Conservator as aforesaid had this agreement not been made; provided, however, that no outstanding Non-Can Policies are reinsured or assumed under this paragraph, and all of such policies are hereby expressly excepted from the obligations of the New Company under this paragraph.

Reinstatement of Lapsed Policies

(4) The New Company will reinstate any policies heretofore issued, assumed, or reinsured by the Old Company, which are not excepted from the obligations of the New Company contained in the foregoing paragraph and which at the effective date of this agreement, by their terms, were entitled to reinstatement, provided that all requirements necessary to procure a reinstatement of said policies under their terms are fulfilled to the satisfaction of the New Company.

3040 The New Company will also reinstate, during the lifetime of the insured and provided the insured is not in such condition as to be eligible for benefits under the policy, without evidence of insurability, any of the policies reinsured and assumed under Paragraph (3) hereof, which have lapsed since the effective date of this agreement, upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made and premiums
3041 are paid within seventy-five (75) days after the entry of the order of the Court approving this agreement. Upon the reinstatement of such lapsed policy it shall, for all purposes, be treated (but only from and after the date of reinstatement) the same as if it had been in force on the effective date of this agreement and be subject to the terms and conditions of this agreement.

Payment of Policy Claims Other Than Claims on Non-Can Policies.

3042 (5) The New Company will pay in full, in accordance with the terms and conditions of all policies including annuities under which claims shall have been or may be made, and whether or not the claims arose or matured prior or subsequent to the effective date of this agreement, all policy claims against the Old Company (except claims on Non-Can Policies) including, without limiting the same to, claims for death benefits, matured endowments, annuity payments, per-

manent total disability and premium waiver bene-
3043 fits, accident and sickness benefits, payment under policy settlement agreements, policy dividends left at interest with the Old Company prior to the effective date of this agreement, and payments under all other matured contracts under which the proceeds of policies and contracts were left with the Old Company prior to the effective date of this agreement; and the New Company will assume the liabilities of the Old Company
3044 with respect to deposits, moneys left with the Old Company at interest, overpayments, duplicate payments, or advance payments of premiums, and return of premiums arising from cancellations prior to July 22, 1936; all subject, however, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against any such claim or claims which would have been available to the Old Company had this agreement not been made.

3045 Participating Department

(6) The New Company agrees to establish a separate department for Participating Life Insurance, and to allocate thereto specifically or in tenancy in common that portion of the assets conveyed to it by the Conservator (other than the Three Million Dollars ($3,000,000.) transferred to the New Company for its capital stock) in the ratio in which assets appearing on the books of the Life Department of the Old Com-

pany were credited to the Participating Life Department of the Old Company on its books as of July 22, 1936, subject to such changes as may have been made therein in the ordinary course of the operations of the business of the Old Company by the Conservator, including the writing of the new participating life insurance by the New Company, and except assets of the book value of One Million, Seven Hundred Ninety-Two Thousand, One Hundred Eighteen Dollars and Ninety-seven Cents ($1,792,118.97) transferred by the Conservator to the Accident and Health Department.

The said Three Million Dollars ($3,000,000.) transferred to the New Company for its capital stock constitutes and shall constitute the capital and paid-in surplus of the New Company; and neither the Participating Department nor the holders, present or future, of participating policies shall have any right, claim, or interest therein prior to other Departments or their policy holders. The said assets transferred to the Accident and Health Department are and shall be the property of the said Department free from any claim of the Participating Department, or the holders, present or future, of participating policies.

It is hereby agreed by the New Company, and all persons accepting reinsurance hereunder do by such acceptance agree, that the assets of

the Participating Department, and its business, and the receipts in respect of said business shall, subject to the limitations hereinafter contained, be appropriated and held as absolutely for the benefit of and to the security of the policies and policy holders of that Department as though they belonged to a mutual insurance company carrying on no other business; and, to the extent of the reserves from time to time required on the policies and policy liabilities of said Department, in priority to the claims of all other creditors, past, present, and future, of said Department.

The Board of Directors of the New Company shall, from time to time, and at least annually, transfer from the Participating Department to the funds of the New Company available for its general corporate purposes, such sums as it may deem available, if any, but in no event exceeding in the aggregate ten percent. (10%) of the net profits (before dividends, and without charging thereto cost of acquisition of new business) then accrued on policies of the Old Company reinsured hereunder earned subsequent to the effective date of this agreement (whether arising from mortality savings, investment income, expense savings, or otherwise, and after taking into consideration gains or losses on the sale or other disposition of assets, and such reasonable adjustment in the value of any assets, or reserves

for anticipated losses thereon, or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination of the New Company). Any portions of such ten percent. (10%) not so transferred at any time shall be cumulative, and shall be transferred from time to time thereafter, from profits, and subject to limitations, as aforesaid. Any statute of limitations which might apply to bar the right to require such transfer is hereby waived.

Any surplus from time to time existing in said Department (whether arising from mortality savings, investment income, expense savings, or otherwise, and after taking into consideration gains or losses on the sale or other disposition of assets, and such reasonable adjustments in the value of any assets, or reserves for anticipated losses thereon, or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination of the New Company), may be used only for the following purposes:

(a) The payment of policy dividends to policy holders in accordance with the terms of their policies and in such amounts as the Board of

3055 Directors of the New Company may from time to time consider proper and advisable, taking into consideration the amount of earnings and other relevant data.

(b) For the payment of any of the costs and expenses of operation of said Department, including the acquisition and carrying of new business written by said Department in such amounts as the Board of Directors of the New Company may from time to time deem reasonably necessary
3056 or desirable.

(c) Necessary working capital may be supplied to said Department from time to time from any moneys available for general corporate purposes and the Board of Directors of the New Company shall, when in their discretion it shall appear practicable, in subordination to the rights of the policy holders of said Department, and from surpluses accumulated in said Department after the payment of reasonable and appropriate
3057 dividends to the policy holders thereof as provided in subparagraph (a) of this paragraph 6, restore the amount of the working capital so supplied, together with interest thereon at the average rate of interest earned by the New Company during the period, to the sources from which it came.

(d) For the payment into funds of the New Company available for its general corporate purposes of a portion, (not exceeding ten percent

(10%) of the net earnings of the participating policies of the Old Company reinsured hereunder, as hereinbefore provided. In computing dividends payable to participating policy holders, any amounts paid under this subparagraph shall be charged against said policies reinsured and no part thereof shall be charged against participating policies issued by the New Company.

(e). Any remaining portion of said surplus shall be kept separate and distinct from the funds of all other departments; and shall be held as absolutely for the security of and the benefit of the policy holders of the Participating Department as though it belonged to a mutual company carrying on no other business.

Non-Participating Department

(7) The New Company further agrees to establish a separate department for its Non-Participating Life Insurance, and to allocate thereto specifically or in tenancy in common that portion of the assets conveyed to it by the Conservator in the ratio in which assets appearing on the books of the Life Department were credited to the Non-Participating Department of the Old Company on its books as of July 22, 1936, subject to such changes as may have been made therein in the ordinary course of the opera-

3061 tion of the business of the Old Company by the Conservator, including the writing of new non-participating life insurance by the New Company.

It is hereby agreed by the New Company, and all persons accepting reinsurance hereunder do by such acceptance agree, that the assets from time to time held in said Non-Participating Department shall, to the extent of the reserves from time to time required on the policies and policy
3062 liabilities of said Department, be appropriated, and held as absolutely for the benefit of and to the security of the policies and policy holders of said Department as though they belonged to a company carrying on no other business, and in priority to the claims of all other policy holders or creditors, past, present or future, of the New Company.

3063 Any surplus from time to time existing in said Non-Participating Department (whether arising from mortality savings, investment income, expense savings, or otherwise, and after taking into consideration gains or losses on the sale or other disposition of assets and such reasonable adjustments in the value of any assets, or reserves for anticipated losses thereon, or otherwise, as the Board of Directors of the New Company may from time to time establish, sub-

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3064 ject only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination of the New Company) may from time to time be used for the general corporate purposes of the New Company subject to any express limitations herein contained.

Accident and Health Department

(8) The New Company further agrees to establish a separate department for its Accident
3065 and Health Insurance (including Non-Can Policies), and to allocate thereto the assets conveyed to it by the Conservator which had been credited to the Accident and Health Department of the Old Company on its books as of July 22, 1936, and those assets of the book value of One Million, Seven Hundred Ninety-two Thousand, One Hundred Eighteen and 97/100 Dollars ($1,792,118.97) heretofore transferred by the
3066 Conservator to the Accident and Health Department, subject to such changes as may have been made therein in the ordinary course of the operation of the business of the Old Company by the Conservator, including the writing of new accident and health insurance by the New Company.

It is hereby agreed by the New Company, and all persons accepting reinsurance hereunder do by such acceptance agree, that the assets from

3067 time to time held in said Department shall, to the extent of the reserves from time to time required on the policies and policy claim liabilities of said Department, be appropriated for the benefit of and to the security of the policies and policy claim liabilities hereof in priority to the claims of all other policy holders or creditors, past, present, or future, of the New Company.

Any surplus from time to time existing in said
3068 Department (after taking into consideration gains or losses on the sale or other disposition of assets and such reasonable adjustments in the value of any assets, or reserves for anticipated losses thereon or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination of
3069 the New Company) may from time to time be used for the general corporate purposes of the New Company subject to any express limitations herein contained.

Inter-Departmental Transactions

(9) Neither anything in this agreement contained, nor the separating of the business of the New Company into Departments, as aforesaid, shall be deemed to prevent the apportion-

3070 ment among Departments of their fair and equitable shares of expenses; nor the exchange, upon a fair and equitable basis, of assets between Departments; nor reinsurance between Departments in the ordinary course of business and at customary reinsurance rates. Any determination by the Board of Directors of the New Company with respect to any such apportionment or exchange shall be final and conclusive upon all 3071 persons interested, subject only to adjustment upon order of the Commissioner made in the course of or as a result of any examination of the New Company.

Reinsurance and Assumption of Non-Can Policies.

(10) The New Company does hereby reinsure and assume, as of the effective date of this agreement, the liability of the Old Com- 3072 pany or of the Conservator, whether incurred in his name as Conservator, in the name of the Old Company, or in the name of the New Company under all Non-Can Policies issued by the Old Company and outstanding and in force on the books and records of the Old Company at the effective date of this agreement, subject, however, to the terms, conditions, and limitations, and only to the extent, hereinafter specifically

3073 provided; and subject, further to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against such policies or any claims and actions thereon which would have been available to the Old Company or to the Conservator as aforesaid had this agreement not been made.

Terms, Conditions, Limitations, and Extent of Reinsurance and Assumption of Non-Can

3074 Policies.

(11) The New Company does not assume any liability for monthly benefits on Non-Can Policies reinsured hereunder unless the disability commenced prior to the effective date of this agreement and notice of claim was filed in accordance with the terms of the policy, and in no event later than twenty (20) days after the effective date of this agreement, except to the

3075 extent of the following percentages of the monthly disability benefits originally provided under said policies according to the following premium classes respectively (but subject to restoration of monthly benefits as hereinafter provided):

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Prem. Class	Issued Under Rate Books	Policy Forms	Issued Under Policy Numbers	Percentage of Original Monthly Benefit Assumed By New Company
1918	A1445-A-1445Z A1445Y-A1445X A1445W	A231 to A288 inc.	2658601 to 2698150 4600501 to 4628000 4711101 to 4712000 4730901 to 4731100	20%
1921	A1687-A1687Z A1687Y-A1687X A1687W	A291 to A294 inc. A365-A366	4628001 to 4700000	35%
1926	A1958-A1958Z A1958Y	A382-A383 A386-A387 A387Z	5500001 to 5600000	45%
1929	A2293	A382-A383 A386-A387 A387Z	5600001 to 5620000	55%
1931	A2367	A753 to A756 inc. A763-A764	5620001 to 5635000	65%
1932	A2432-A2432Z A2499	A775 to A780 inc.	5635001 to 6000000	90%
	A2499	Aggregate A1216 to A1221 inc.	6500001 to 7000000	90%
1935	A2567	Aggregate A1226 to A1229 inc.	7000001 to 7100000	90%

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Note: All of the above mentioned Rate Books are Rate Books issued by the Old Company and copies are on file at the office of the New Company at 523 West Sixth Street, Los Angeles, California, and in the offices of the Insurance Commissioners or similar public officials of each state in which the Old Company has been transacting insurance business, except in states where such filing is not required by law.

3079 Notwithstanding the foregoing limitation on the obligation of the New Company to make monthly disability payments at such rates on such policies, to be entitled to the reinsurance and assumption of his Non-Can Policy by the New Company as aforesaid, the policyholder shall be obligated to continue to make premium payments as originally provided in his policy.

Reinstatement of Lapsed Non-Can Policies

3080 (12) The provisions of paragraph 4 of this agreement with respect to reinstatement of lapsed policies other than Non-Can Policies shall apply to Non-Can Policies, subject to the terms, conditions and limitations contained in paragraphs 10 and 11 hereof.

Payment of Claims on Non-Can Policies in Respect of Disabilities Existing Prior to Effective Date of this Agreement

3081 (13) The New Company shall be obligated to pay all disability benefits under Non-Can Policies for disabilities commencing prior to the effective date of this agreement with respect to which claims or notices of claims were duly filed in accordance with the terms of such policies, and in any event not later than twenty (20) days after the effective date of this agreement, and all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and

3082 provisions of such Non-Can Policies, and subject to the terms of any such settlement agreements; and subject, further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company or to the Conservator as aforesaid had this agreement not been made.

Restoration of Benefits under Non-Can Policies

3083 (14) The Board of Directors of the New Company shall from time to time transfer from the funds of the New Company available for its general corporate purposes to a special fund for the restoration of benefits under Non-Can Policies in such manner as the Board of Directors with the approval of the Commissioner may from time to time determine, such amounts as said Board of Directors in its discretion shall determine to be not reasonably required for the 3084 reasonable, proper and profitable conduct of the operations of the New Company as a going concern. At time of any examination of the New Company by the Commissioner, the Commissioner may require the transfer of additional funds to such special fund, to the extent such additional funds available for general corporate purposes are in his opinion available without interfering with the proper and profitable conduct of the business of the New Company as a going concern.

3085 The moneys and other assets from time to time held in such special fund shall be used by the New Company, with the approval of the Commissioner, and in such manner as he may from time to time require, for the purpose of paying additional disability benefits to holders of Non-Can Policies then, thereafter, or theretofore entitled thereto, in excess of the amounts required to be paid under paragraph 11 hereof, to the end that the benefits originally provided in
3086 said Non-Can Policies as written may eventually be fully paid, including eventual full payment of benefits becoming due prior to the time of such restoration, with interest on deferred restoration payments of such benefits at the rate of three and one-half per cent. (3½%) per annum. The extent and manner of the restoration so required or approved by the Commissioner shall be binding upon all holders of Non-Can Policies, and all other persons interested therein.

3087 The New Company may at any time, with the approval of the Commissioner, transfer all of such special fund to the reserves for Non-Can Policies, and, with the approval of the Commissioner, may fully assume and reinsure all Non-Can Policies hereby partially and conditionally reinsured, to the full amount thereof and in accordance with the terms thereof as written; and if the Commissioner at the time of any examination of the New Company shall determine that in his opinion the amount of such

3088 special fund is sufficient to permit the establishment therefrom of adequate reserves for the full reinsurance of such Non-Can Policies, he may require such transfer and full reinsurance.

Upon such full reinsurance with the approval of or in accordance with the requirements of the Commissioner, the benefits on Non-Can Policies shall be deemed fully restored.

After the benefits on Non-Can Policies shall have been fully restored, the said special fund
3089 shall be abolished, and any assets remaining therein at that time shall be available for the general corporate purposes of the New Company.

The New Company shall be under no obligation to pay or restore the full benefits under Non-Can policies as originally provided therein, except in the manner and to the extent hereinbefore described; provided, that if title to all or substantially all of the assets of the Accident and Health Department of the New Company
3090 shall hereafter be transferred, by voluntary act (other than by statutory merger or consolidation) or by operation of law, to any person who does not in connection with such transfer assume all of the obligations of the New Company to holders of Non-Can Policies, including obligations to restore the benefits thereunder in substantially the manner in this paragraph 14 provided, then and in that event the New Company will be deemed to have fully reinsured and

3091 assumed all of the Non-Can Policies, including the obligation to pay in full all installments of the disability benefits originally provided to persons theretofore entitled thereto.

Assumption of Claims against Old Company

(15) The New Company hereby assumes and agrees to pay in full:

(a) All costs and expenses of the Conservator, including attorney's fees fixed and approved as required by law.

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(b) All Federal taxes finally determined to be due from the Old Company. The United States shall have the same legal right of priority and preference with respect to the payment of such taxes out of the assets of the New Company as it had against the assets of the Old Company had these proceedings not intervened, and the New Company agrees that the United States shall have the same remedies against it and its assets with regard to the collection of such taxes as the United States had against the Old Company. No provision of this agreement shall be construed as limiting the operation of the provisions of this subparagraph; nor shall the assets of the Old Company be so valued or the amount of the reserves so redetermined as to prejudicially affect the rights or remedies of the United States. In consideration of the forbearance on the part of the United States at this time to enforce payment of its taxes, all parties

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3094 hereto agree that the right of the United States to enforce the provisions of the agreement shall be as full and complete as if the United States were named a party hereto.

It is agreed that the foregoing subparagraph (b) shall be embodied in and become a part of the Court's decree of confirmation.

(c) Taxes legally due from the Old Company to any State of the United States, to any County, or to any political subdivision.

3095 (d) Wages, salaries, and pensions legally due to persons employed by the Old Company for services rendered, and current bills and expenses, other than insurance liabilities, in connection with the operation of the business of the Old Company, incurred prior to July 22, 1936, and remaining unpaid, subject of course to any defenses the Old Company may have had thereto.

Assumption of Claims against Conservator

3096 (i) The New Company agrees to indemnify the Conservator against any and all claims and liabilities incurred by him in his capacity as Conservator in connection with the operation of the business of the Old Company, whether in his name as Conservator, in the name of the Old Company, or in the name of the New Company.

Assumption of Claims against Liquidator

(17) In the event the Commissioner shall hereafter be appointed Liquidator of the Old

Company, the New Company agrees to assume, and does hereby assume and agree to pay, all costs and expenses of such Liquidator, including attorney's fees, fixed and approved as provided by law. The New Company further agrees to pay, and does hereby agree to pay to the Liquidator for payment to claimants an amount equal to the sum of all claims against the Old Company filed with the Liquidator and finally allowed; provided, however, that the New Company shall not be required to make any payment or payments on account of any claims so filed with the Liquidator except to the extent and in the manner hereinafter provided (but the New Company, with the consent of the Commissioner, may waive the foregoing limitation and anticipate any such payments):

(a) The New Company will, as of the effective date of this agreement, with the approval of or in accordance with the requirements of the Commissioner, establish reserves against all policies and policy liabilities of the Old Company subject to assumption or reinsurance hereunder (but, with respect to Non-Can Policies, only to the extent described in paragraphs 11 and 13 hereof). If any policyholders or policy claimants shall elect to reject assumption and reinsurance hereunder, the New Company agrees to pay to the Liquidator, immediately after the time for filing claim with said Liquidator shall

3100 have expired, an amount equal to the reserves so originally established against their policies or claims.

(b) Whenever, pursuant to the provisions of paragraph (14) hereof, any sums are transferred to the special fund for the restoration of benefits under Non-Can Policies, the New Company shall pay to the Liquidator a further sum of money bearing the same ratio to the moneys so transferred as the Non-Can Policies (evaluated as
3101 hereinafter provided) whose holders have rejected reinsurance hereunder and upon which claims have been filed in the liquidation proceedings as aforesaid, bears to the Non-Can Policies (evaluated as hereinafter provided) whose holders have accepted reinsurance hereunder.

Until such time as the measure of the claims, to the allowance of which holders of Non-Can Policies who file their claim in liquidation proceedings under the laws of the State of Cali-
3102 fornia are entitled, shall have been determined to the satisfaction of the Liquidator and he shall so notify the New Company in writing, Non-Can Policies shall, for the purpose of this subparagraph, be evaluated on the basis of the percentage established by paragraph 11 hereof of their monthly benefit originally provided, whether or not the holders thereof have accepted reinsurance hereunder.

When the measure of the claim to the allowance of which holders of such policies are en-

titled, as aforesaid, shall have been determined to the satisfaction of the Liquidator, and he shall so notify the New Company in writing, Non-Can Policies shall thereafter be evaluated for the purposes of this subparagraph, on the basis of allowable claim, whether or not the holders hereof have accepted reinsurance thereunder; but subject to readjustment as hereinafter provided in case of any final determination by the courts of California of any other measure.

In the event payments have been made under any evaluation which is later altered as hereinbefore provided, a recomputation shall be made; and if as a result thereof it appears that there has been an overpayment to the Liquidator, he shall immediately refund to the New Company the amount of such overpayment; but if as a result of such recomputation it shall appear that there has been an underpayment to the Liquidator, the New Company shall adjust such underpayment solely out of funds available for its general corporate purpose, in the manner and upon the terms provided in paragraph 14 hereof for the creation of the special fund where referred to, but in priority to the claims of such fund.

(c) Any remaining amount necessary to pay and discharge the claims as aforesaid shall be paid at the time benefits under the Non-Can Policies are fully restored.

(d) The aggregate of the payments to be
3106 made in subparagraphs (a), (b), and (c) hereof, shall not exceed the full amount of claims finally allowed in the Liquidation proceedings as aforesaid. Any moneys paid hereunder and remaining in the hands of the Liquidator after all claims filed with him and finally allowed have been paid, shall be by him returned to the New Company.

(18) Any payments made by the New Com-
3107 pany to the Liquidator under the provisions of paragraph 17 hereof may be made in cash or in securities or other assets satisfactory to the Liquidator taken at a valuation satisfactory to him. If payment is made otherwise than in cash, the Liquidator may, at any time, return any of such securities or other assets to the New Company at the valuation at which the same were taken, and the New Company shall substitute therefor cash or other securities or
3108 assets as aforesaid.

Proceeds of Assets Held by Conservator or Liquidator

(19) The conservator, or, if the Commissioner is hereafter appointed Liquidator of the Old Company, such Liquidator, shall proceed in such manner and at such time as he deems proper, subject to the provisions of paragraph 20 hereof, to realize upon the assets still held by him as Conservator or as such Liquidator.

In consideration of the various covenants of the New Company herein contained, and for the purpose of protecting holders of Non-Can Policies and of assuring an equitable division of the assets in liquidation among all policyholders and creditors of the Old Company, the Conservator agrees, for himself and for the Liquidator as his successor in title, that the proceeds of any of such assets (other than assets received under the provisions of paragraph (17) hereof) which may hereafter be received by him (or by the Liquidator as his successor in title) shall be used in the manner and only in the manner hereinafter in this paragraph 19 described; and a lien or charge is hereby established upon said proceeds accordingly;

(a) Said proceeds and any part thereof may be used by the Conservator or Liquidator for the payment of any of his costs or expenses of administration, including attorney's fees fixed and approved as provided by law; and any claims having preference in the liquidation proceedings by the laws of the United States or by the laws of the State of California; and thereupon the obligation of the New Company to pay such costs, expenses, or claims shall be released pro tanto.

(b) In the event benefits under Non-Can Policies shall not theretofore have been fully restored as provided in paragraph 14 hereof, a portion of the remaining proceeds (but not ex-

ceeding the amount required to provide complete restoration of the benefits under Non-Can Policies) in the ratio which exists between the Non-Can Policies (evaluated as provided in subparagraph (b) of paragraph 17 hereof) whose holders have accepted reinsurance hereunder, and all Non-Can Policies (evaluated as provided in subparagraph (b) of paragraph 17 hereof), whether their holders have accepted reinsurance, or have rejected reinsurance hereunder, and have filed claims in the liquidation proceedings, shall be paid to the New Company, and by it transferred to the special fund described in paragraph 14 hereof.

In the event payments have been made hereunder under any temporary evaluation which is later altered as hereinbefore permitted, a recomputation shall be made; and if as a result thereof, it appears that there has been an underpayment from the Liquidator, he shall immediately adjust such underpayment from funds in his hands; but if as a result of such recomputation it shall appear that there has been an overpayment from the Liquidator, the New Company shall repay to the Liquidator from the special fund established pursuant to paragraph 14 hereof when and as there are sufficient moneys therein, (but in priority to the rights of holders of Non-Can Policies who have accepted reinsurance hereunder to restoration of their benefits) the amount of such overpayment.

(c) Any portion of such proceeds remaining after making the payments described in subparagraphs (a) and (b) hereof shall be used to pay and discharge claims filed with the Liquidator and finally allowed.

(d) Any portion of such proceeds remaining after making the payments described in subparagraphs (a), (b) and (c) hereof shall be paid to the New Company for the purposes of the special fund described in paragraph 14 hereof, to the extent the same may be required to provide full restoration of the benefits under Non-Can Policies.

(e) Any portion of such proceeds remaining after making the payments described in subparagraphs (a), (b), (c) and (d) hereof shall be disposed of by the Liquidator in the manner provided by law.

Mutualization and Disposition of Stock of New Company

(20) Neither the Conservator, nor, if one be appointed, the Liquidator, of the Old Company, shall dispose of any of the stock of the New Company except as follows:

(a) At any time between July 1, 1946, and January 1, 1948, and thereafter so long as the Conservator or a Liquidator of the Old Company may continue to hold any or all of said stock, ten percent (10%) of the holders of

participating policies of life insurance entitled to vote at a policy holders' election on a proposal for voluntary mutualization of the New Company, whether those reinsured hereunder or those issued by the New Company (each policy holder for this purpose being regarded as one person regardless of the number of policies owned or amount of insurance held) may request the New Company to create an Appointing Committee as hereinafter provided to exercise the duties and functions hereinafter specified in respect of a proposed voluntary mutualization of the New Company, in accordance with the laws of the State of California in effect at the time of said request, or, if said laws then so permit, of any one or more departments thereof. Such request shall specify the department or departments of the New Company desired to be mutualized.

Upon the receipt of such request the New Company shall create an Appointing Committee consisting of the then President of the Association of Life Insurance Presidents, the President of Leland Stanford Jr. University, and the Provost of the University of California at Los Angeles, or persons occupying similar positions if their or any of their titles shall have been changed. In the event any one or more of such persons shall refuse or be unable to act, the remaining member or members shall fill the vacancy or vacancies thereby created by their

appointment in writing of another person or persons of similar position and standing. If all of said persons refuse or are unable to act, the Court or any Judge thereof shall, on the application of the Commissioner, designate an Appointing Committee consisting of three (3) persons of similar position and standing. Said Appointing Committee, acting through not less than a majority of its members, shall designate a Price Determination Committee of not less than three and not more than five (5) persons skilled in matters of insurance company valuation, which committee, acting through not less than a majority thereof, shall determine whether in their opinion the proposed voluntary mutualization of the New Company, or of the department or departments thereof specified in said request can then be practicably accomplished having due regard to the interests of all persons interested in the New Company. If it be determined that such mutualization is not then practicable no further steps shall be taken in connection with a possible mutualization of the New Company under the provisions of this subparagraph until at least six months after the date of such determination. If in the opinion of a majority of the members of the committee such mutualization is then practicable, the committee shall determine the proper price to be paid upon such mutualization and appropriate terms of payments thereof; said de-

termination shall not be made, however, prior to January 1, 1947.

If, at the date of the appointment of such committee the New Company shall have in force Participating Life Insurance written subsequent to the effective date of this agreement in an amount in excess of its Non-Participating Life Insurance written during the same period, one-half (½) of such excess shall, for the purpose of fixing the proper price to be paid (but for no other purpose) be deemed to be, and shall be valued as, Non-Participating Life Insurance. If at the time of such appointment, there shall have been transferred from the Participating Department in accordance with the provisions of subparagraph (d) of paragraph 6 hereof, less than ten percent. (10%) of the then accrued earnings described therein, or if there shall have been transferred to the Participating Department any working capital pursuant to the provisions of subparagraph (c) of said paragraph 6, any unpaid balance thereof shall, for the purpose of fixing the proper price to be paid (but for no other purpose) be deemed to be a debt when due and matured. Said Committee shall in its report to the New Company include a plan of mutualization of the New Company, or of the department or departments thereof specified in said request of the policy holders. Such plan shall specify, in addition to any other relevant

matters, the price to be paid, the terms of payment, and the persons by whom and the manner in which the right to vote the stock of the New Company is to be exercised pending complete payment of the purchase price. In this connection the said Committee, if it deem it advisable, may provide in the plan for the creation of a voting trust, designate the initial trustees, and make provision for the appointment of their successors. Unless the benefits under Non-Can Policies have theretofore been fully restored and claims against the Liquidator fully paid, such plan shall further provide that such mutualization shall not affect the provisions of paragraph 17 or of paragraph 14 hereof or the right of holders of Non-Can Policies to the restoration of benefits from the sources and in the manner therein provided.

The New Company agrees that within sixty (60) days after the making of such report (unless said report shall be to the effect that mutualization is not then practicable) it will mail copies thereof to all of its policy holders entitled to vote upon such plan or plans of mutualization if submitted according to law. If within one hundred twenty (120) days after the mailing of such notice, ten percent. (10%) of the policy holders entitled to vote upon any such plan or plans (each policy holder being for this purpose regarded as one person regardless of the number

of policies owned or amount of insurance held) shall request in writing the submission thereof, the New Company will promptly submit the same in accordance with the laws of the State of California then in effect. The Conservator for himself and for any successors in the ownership of said stock claiming under him in any manner other than through a sale of said stock pursuant to the provisions of subparagraph (d) hereof agrees to consent and hereby consents as the holder and owner of the stock of the New Company to such plan of mutualization. In the event said mutualization plan is adopted, the Conservator, or a Liquidator as aforesaid, shall dispose of such stock in accordance with such plan. The expenses of the foregoing proceedings including costs, fees, and expenses of the Price Determination Committee, shall be borne by the New Company; and, unless the proposed plan of mutualization is consummated, shall be charged to the Participating Department thereof.

In the event the Price Determination Committee has been appointed as herein provided prior to January 1, 1948, said Committee shall have the power to extend the time within which mutualization may be effected hereunder for such period or periods of time as it may deem necessary for the orderly completion of mutualization proceedings as herein provided.

(b) If at any time prior to the expiration of the option to mutualize a plan of merger, consolidation, reorganization or reinsurance of the New Company is presented to the New Company, or to the Conservator or Liquidator, which in the opinion of the Board of Directors of the New Company cannot be consummated without the elimination of the provisions for mutualization herein contained, the new Company may create an Appointing Committee in the same manner as though the proceeding were under subdivision (a) of this paragraph. Said committee, acting through not less than a majority of its members, shall designate a committee of not less than three nor more than five persons, skilled in matters of insurance company administration and management. The committee so designated shall, acting through not less than a majority of its members, determine whether or not such plan of merger, consolidation, reorganization or reinsurance is practicable and desirable, having due regard to the interests of all persons interested in the New Company. If the committee determine that such plan is practical and desirable it shall determine a reasonable time which should be allowed for the consummation of the plan. Thereupon the New Company with the written approval of the Conservator or Liquidator, if then there be one, may submit to a vote of the policy holders (voting in the manner then prescribed by the laws of the State of

California relating to voluntary mutualization) a proposal to suspend the mutualization provisions of this agreement for the time fixed by the committee, which proposal shall contain a brief description of the plan. If a majority of the policy holders so voting (but not less than ten percent. (10%) of those entitled to vote) vote in favor of the proposal, said provisions for mutualization shall be suspended for the time so specified and for the sole purpose of consummating the particular plan; and said plan may be consummated within said time free from said provisions and as though no such provisions had ever been contained in this agreement; but unless said plan be consummated within such time said provisions ipso facto shall become fully effective as though there had been no suspension thereof.

The New Company shall, however, at least fifteen (15) days before any vote of policy holders is called under the provisions of this subparagraph, give written notice to each of its General Agents of the intention to call or take such vote. Such notice shall be deemed sufficiently given if and when it is deposited in the United States mails in a properly stamped container, addressed to such General Agent at his latest address appearing on the records of the New Company.

(c) At any time while the stock of the New Company is held by the Conservator or the

Liquidator and has not been sold by him the Old Company shall have the right to pay to the Conservator or to the Liquidator the full amount then required by the New Company to complete the restoration of Non-Can benefits and also the amount required by the Conservator or Liquidator to complete the payment of all his claims and liabilities. In the event the benefits on Non-Can Policies shall have been fully restored from earnings of the New Company, contributions of the Old Company, or its shareholders, or otherwise, and all expenses of and claims against the Conservator or Liquidator of the Old Company have been fully paid, the Conservator or such Liquidator shall, upon order of the Court, distribute the stock then held by him in the manner provided by law; provided, however, that if such distribution is made prior to the expiration of the option to mutualize granted in subparagraph (a) of this paragraph 20, the distributees and their successors in the ownership of said stock, shall remain bound, until the expiration of said option, to the aforesaid consent to any mutualization plan of the New Company proposed in accordance with the provisions of subparagraph (a) of this paragraph 20.

The Conservator or Liquidator shall cause to be endorsed upon the certificates evidencing the ownership of such stock an appropriate legend giving notice of the said option to mutualize;

and the New Company shall cause a similar legend to be endorsed upon all certificates into which the same may be transferred prior to the expiration of said option.

(d) In the event the Conservator or Liquidator shall at any time determine that conditions are such as to require a sale of said stock, or any thereof, for the protection of the estate in conservation or liquidation, the New Company, or its policy holders, he may sell the same upon order of the Court, made after a proper showing of the necessity for such sale upon a full hearing, of which hearing notice shall be given to such parties as the Court may determine are interested therein, and in such manner as the Court may direct.

(e) It is the purpose, spirit, and intent of this agreement that, unless the provisions for mutualization are eliminated pursuant to the provisions of subparagraph (b) of this paragraph 20, the stock of the New Company shall not be sold or disposed of prior to the full restoration of benefits under Non-Can Policies except by proceedings for mutualization, so long as a reasonable probability of completing restoration of benefits under Non-Can Policies shall continue; and also, to the end that benefits under Non-

3145 Can Policies may be restored as early as practicable, the New Company declares that it will be its policy, at all times while its stock is held by the Conservator or Liquidator, so far as is reasonably practicable in the ordinary and reasonable conduct of its business, to endeavor to write new Non Participating insurance in an amount equal to or in excess of the amount of new Participating Insurance written by it.

3146 (f) If the provisions of this paragraph 20, or of any one or more of the subparagraphs hereof, should be contrary to law or illegal or void, then such paragraph, subparagraph, or subparagraphs, shall be null and void, and shall be deemed separable from the remaining covenants and agreements in this agreement contained; and shall in no way affect the validity of any of the remaining provisions of this agree-
3147 ment.

Agents

(21). The New Company hereby assumes all obligations of the Old Company under agency contracts, provided the other party thereto accepts assumption of his contract by the New Company and agrees to continue bound thereby; provided, however, that the New Company shall not assume or be bound by any agreement or

agreements which the Old Company may have made with agents with respect to the payment of commissions on any policies after lapsation. For the purpose of determining Agent's commissions, the reinsurance of policies of the Old Company under this agreement shall be deemed a continuance of existing policies, and not the writing of new insurance by the New Company.

Moratorium

(22) A Moratorium shall be and is hereby imposed upon all cash surrender values and policy loan (except loans for the purpose of paying premiums due or to be due within thirty (30) days of the loan date on the same policy or on policies of any form (issued with respect to the same person) for a period expiring November 22, 1936; and provided, that the period or extent of this moratorium may be extended or restricted from time to time by ex parte order of the Court made on the application of the Commissioner.

The provisions of this paragraph shall not, however, apply to any increases in values that are accumulated from premium payments or loan repayments which are received subsequent to the effective date of this agreement.

3151 During such period as this moratorium is in effect, the cash surrender option of all policies of the Old Company shall be considered as non-existent, except as provided above, and all policy holders who do not pay their premiums, and who are entitled under their policies to a guaranteed value, will be restored to the automatic non forfeiture value (properly adjusted for any policy indebtedness and accrued interest thereon) under
3152 the policy.

Notice

(23) The New Company shall mail as promptly after the making of the order approving this agreement as shall be reasonably practicable to the insured named in all policies and supplementary contracts of the Old Company in force at the effective date of this agreement, and any assignees thereof of record, a copy of this
3153 agreement as executed, to which the New Company may attach its certificate of reinsurance and assumption, inserted in an envelope, first class postage prepaid, addressed to the name and address of each of the persons aforesaid last shown upon the records of the Old Company. There shall also be included therewith a notice referring to the provisions of paragraph 24 hereof with respect to the manner in which election or rejection

of the reinsurance and assumption hereby con-
3154 tained must be manifested. By "assignees of record" is meant assignees appearing upon the records of the Old Company at its Home Office.

Election of Policy Holders and Claimants and the Effect Thereof

(24) Policy holders and policy claimants of the Old Company may elect to accept or reject the reinsurance and assumption hereunder of *his* policy, contract, or claim at any time within sev-
3155 enty-five (75) days after the entry of the order approving this agreement. The filing with the New Company after the entry of the order of the Court approving the agreement of any claim or proof of loss shall constitute an acceptance of this agreement and a waiver of any right to reject the same. Any policy holder or policy claimant who shall fail to notify the New Company, in writing, of his rejection within said period shall automatically be deemed to have assented to
3156 and become bound by this agreement, and entitled to the benefits hereof.

The filing of a claim with the Liquidator shall, unless such claim is withdrawn within seventy-five (75) days after the entry of the order of the Court approving this agreement, be deemed a rejection of such reinsurance and assumption. The New Company may nevertheless, with the consent of the Commissioner, and upon such terms as the New Company in its sole discretion may

3157 desire to impose, permit the withdrawal of a rejection whether or not the period for election herein fixed shall have expired, and permit the person so withdrawing his rejection to accept the reinsurance and assumption herein contained.

Any person electing to accept the reinsurance and assumption herein contained shall thereby be deemed to have entered into a novation with the New Company, and to have released the Old Company from all claims, liabilities, or obliga-
3158 tions with respect to his policy or policy claim hereby assumed or reinsured, whether wholly or partially assumed or reinsured.

Conservator Not Personally Liable

(25) No personal liability on the part of Samuel L. Carpenter, Jr. is assumed under this agreement, but he is bound by the provisions of this agreement only in his capacity as such Conservator or as Liquidator of the Old Company.
3159 All undertakings and obligations herein set forth as undertakings or obligations of the Conservator are made only in his said capacities and to such extent as he had authority to make the same, and the Conservator makes no warranty of his authority to make the same.

Liability of New Company Limited Hereby

(26) It is understood that the New Company does not assume any liability of any character or description whatsoever of the Old Company

3160 except as and to the extent in this agreement expressly provided, and the provisions of this agreement shall be a complete and adequate defense by the New Company to any action, other than an action to enforce the express provisions of this agreement, which may be brought by any policy holders, policy claimants, creditors, or stockholders of the Old Company.

Assignability of Agreement

3161 (27) This agreement and all rights, duties, and obligations hereunder shall inure to the benefit of and be binding upon the respective parties hereto, their several heirs, executors, administrators, successors, and assigns.

Approval of the Court

(28) This agreement shall not become binding upon any party hereto unless and until it shall have been approved by an order of the Court; and when so approved shall constitute an 3162 independent agreement, superseding all prior agreements; and also an amendment of the agreement of July 22, 1936, relating to the reinsurance by the New Company of the business of the Old Company in such manner that said agreement, as amended, shall read in its entirety in the language of this agreement.

In Witness Whereof, the parties hereto have executed this agreement as of July 22, 1936, at the hour of one o'clock P. M. Pacific Standard

Time, but in fact on the ..... day of October, 1936.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

By .....
Its Vice-President

(Corporate Seal)

Attest: .....
Its Asst. Secretary
"NEW COMPANY"

.....a.....

SAMUEL L. CARPENTER, JR.
Insurance Commissioner of the State of California, as Conservator of The Pacific Mutual Life Insurance Company of California

The undersigned, Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, does hereby give his written consent to and approval of the foregoing Rehabilitation and Reinsurance Agreement.

.....
SAMUEL L. CARPENTER, JR.
as Insurance Commissioner of the State of California.

pp: vb: lg: rg: lb
9/24/36

Endorsed: Filed Oct. 9, 1936, 11:24 a. m. L. E. Lampton, county clerk; by J. C. Gordon, deputy.

3166 In the Superior Court of the State of California, in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., etc., petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent. No. 404,673.

Proposal of Plan of Rehabilitation.

To the Honorable Superior Court of the State of California, in and for the County of Los Angeles, and—

3167 *To Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California:*

The undersigned, Roscoe R. Hess, a party in interest in the above entitled matter, hereby proposes for consideration by the Court and the petitioner here, the execution of a rehabilitation agreement by the petitioner and the New Company to embody the following general provisions:

General Object of the Plan.

3168 Use the New Company heretofore established as the means of true rehabilitation of the Old Company by the method of increasing assets instead of by reducing liabilities, with the object of continuing to render thereby the public service for which insurance companies are organized.

General Structure of New Company.

Establish six departments in the New Company, to be generally known as:

1. Old Non-Participating Life Department, to reinsure Non-Participating Life insurance

policies (and to assume annuity contracts) of the Old Company;

2. Old Participating Life Department, to reinsure Participating Life Insurance policies of Old Company;

3. Accident Department, to reinsure Accident and Health insurance policies of Old Company, (not including Non-Can policies) and to write new accident and health insurance of the same character;

4. Non-Can Department to reinsure Non-Can policies of Old Company, on basis and conditions hereinafter set forth, but to write no new business;

5. New Non-Participating Life Department, to write new Non-Participating Life insurance and annuity contracts;

6. New Participating Life Department, to write new Participating Life Insurance;

Create capital of the New Company in the sum of $1,000,000 and an initial surplus of $2,000,000, using therefor the assets of the Old Company in the general manner proposed by the Commissioner.

Transfer assets of the Old Company to the New Company in the general manner proposed by the Commissioner's new plan, crediting the same to the first four departments mentioned in the list above, maintaining the assets themselves (and their proceeds) inviolate for the sole use

and benefit of the said four departments, respectively, to the exclusion of each other and to the exclusion of the two new departments of the New Company, except as hereinafter provided.

Transfer all rights of action against officers of the Old Company, to the New Company as an asset of the Non-Can Department.

(Explanation of Result, using figures of December 31, 1935. The amount of the transfer of assets to the Old Participating Life and Old Non-Participating Life Departments will have to be shown as a total, as the Convention Examination on file in court does not disclose the segregation between the two departments. However, as of December 31, 1935, the liabilities of the two departments were $182,178,026.50. The admitted assets of the two Life Departments were $187,893,222.60 and if assets to the extent of $3,000,000 for capital and surplus are deducted, the balance would be $184,893,222.60. Apparently the Commissioner has also transferred $1,792,118.97 to the Accident Department from the Life Departments, thus leaving a balance of $183,101,103.63, or about $1,000,000 more than the book liabilities for the Life Departments ($182,178,026.50).

The exact amount of the assets transferred to the Accident and Health Department can not be set forth due to the inclusion in the Accident Department of the Old Company, of assets for the Non-Can business. However, considering

3175 the 3rd and 4th departments in the foregoing list as a unit, the assets transferred to the books of the New Company for these two departments would be the figure of $27,023,979.50 as the admitted assets shown on page 11 of the Report of Convention Examination, plus the sum of $1,792,118.97, or a total of $28,816,098.47. Upon proper accounting, the segregation of these assets between the Accident and Health Department and the Non-Can Department, could be de-
3176 fined.

Attention is called to the fact that there has been, since December 31, 1935, an appreciation in the value of the assets shown on the books of the Old Company represented by stocks and bonds, that may further increase the total surplus of the New Company, ignoring for the moment, the matter of insufficiency of assets in the Non-Can Department. The matter of this insufficiency and the method proposed of curing it,
3177 is subsequently discussed.

If the reserves for the Life Departments have been correctly computed, the Life Departments will be solvent, and likewise the Accident and Health Department under the presupposition that out of the $28,816,098.47 there will be transferred to the department last mentioned, sufficient money to care for all liabilities. An examination of page 13 of the Report of Convention Examination will show that aside from the liability of $2,903,928.12 as reserve for unearned

premiums and $19,643,031.00 and $24,685,-977.00 as reserves for disabilities on disabled lives and active lives respectively, the other liabilities of the Accident Department amount to roughly $2,600,000.00. Disregarding the matter of unearned premiums, therefore, a sum in the neighborhood of $25,000,000 could be transferred to the Non-Can Department as reserves for both disabled and active lives.

Of the last mentioned sum of $25,000,000, $19,643,031.00 as the reserve set forth on page 12 of the Report, for disabled lives, would be available therefor, and there would remain approximately $5,000,000.00 for purposes of a reserve for active lives of Non-Cans.

Method of Operation of Old Non-Participating Life Department, Participating Life Department and Accident and Health Department.

Conduct each of the three departments, Old Non-Participating Life, Old Participating Life and Accident and Health, as separate units, bearing, of course, proper share of general overhead. The Accident and Health Department can continue existing business, and write new accident and health insurance. The Old Non-Participating Life and Old Participating Life Departments, however, would write no new insurance, leaving new life (and annuity) business for the two new departments of the New Company.

3181 Pay agents' commissions in accordance with contracts of Old Company on all of above business.

Pay dividends on old participating life policies in accordance with mortality savings and profits made, less 10% thereof which shall be transferred annually to the Non-Can Department.

Pay all profits made in Old Non-Participating Department annually to Non-Can Department.

Pay all profits made in Accident and Health
3182 Department annually to Non-Can Department.

(Comments on Operation. Agents of the Old Company claim, and the figures in pages 7 and 8 of the Report of Convention Examination seem to verify the same, that the Accident and Health business yields a profit of approximately $500,000 per year to the company. Whatever the amount is, would be transferred to the Non-Can Department.

The Supplemental Report of Convention not
3183 filed in the proceedings, and held confidential by the Commissioner, indicates that in 1935 the mortality experience of the company was 57.1% of the American Experience Table in the case of Participating Life Insurance, and 66.1% in the case of the Non-Participating Life Insurance. The percentage of entire new life business represented by Non-Participating Life Insurance has risen from 36.3% of the total new life business in 1932, to 47.3% in 1933, to 62.6% in 1934, and to 77.9% in 1935.

3184 The presumption has been that profits arising from the old participating life business were repaid to policyholders in the form of dividends, but it is understood that not all of the profits so arising were in fact so used during the last few years. The justification for the retention of 10% of such profits for transfer to the Non-Can Department is on the theory that such transfer is in lieu of the lien on such policies that should be imposed as a substitute for the ruin-
3185 ous result that would occur to the participating life holders in event of liquidation of the Old Company. The Commissioner has indicated that the entire profit on the participating life business is approximately $3,000,000 per year.

However, the Supplemental Report of Convention Examination raises some question of whether the present rate of dividends to participating life insurance policyholders can be maintained, and even in the last few years the
3186 dividends so paid were only as follows:

1932	$2,894,339
1933	2,243,620
1934	1,704,071
1935	1,763,708

It would therefore be more reasonable to assume that a figure more nearly in the vicinity of $150,000 to $200,000 would represent 10% of the net earnings on the old participating life policies that would be transferred to the Non-Can

Department annually, and perhaps even less as time goes on.

The new life insurance business during the last few years, as indicated from said Supplemental Report, is as follows:

	Total	Non-Participating Percentage of the total
1926	$94,000,000	26.3%
1927	89,000,000	16.7
1932	57,000,000	36.3
1933	45,000,000	47.3
1934	54,000,000	62.6
1935	58,000,000	77.9

At the end of 1935, participating life policies were in the amount of $408,120,271 and non-participating $208,736,136, so that apparently about $90,000,000 of the latter total has arisen within the last three years. With the realization that expense of acquisition of business makes it impossible to make a profit until three years after policies are issued, the profits of the Old Non-Participating Life Department, having no such cost of acquisition to pay for, can be used in part (after transfer to the Non-Can Department, to take care of this cost of new business in the new Participating Life and new Non-Participating Life Departments.

Dividends have been paid during the last several years, and their amount and origin, accord-

3190 ing to the Supplementary Report of Convention Examination, are as follows:

	Accident Dept.	Non-Participating Life Department.
1929	$600,000	$220,000
1930	690,925	290,400
1931	601,773	609,840
1932	609,840	508,200
1933	508,200	254,100
1934	0	863,417
3191 1935	0	127,050
	$3,010,739	$2,873,007
The total was therefore		$5,883,746

It will be noted that the directors of the Old Company seem to have recognized, at least in 1934 and 1935, that no profit was made in the Accident Department, despite the profits arising from the commercial accident and health insurance business. The same cause that led to the
3192 result of such lack of profit, namely, insufficiency of reserves for non-cans, would quite apparently lead to the result of no profit in the entire company, although the propriety of declaring dividends is not an issue in these proceedings. However, the amount of the dividends declared in the early years of the depression might give some rough indication of what might be expected annually from future operations. Moreover, the possibility of recovery from directors who de-

cleared the dividends in 1934 and in January, 1935, should be an asset of the Non-Can Department.

Method Of Operation Of The New Participating And Non-Participating Life Departments.

Operate the new participating life department and the new non-participating life departments as at the initiation of a newly organized insurance company in so far as the capital therefor is concerned, which capital is included in the entire capital and surplus of the New Company.

Use the profits of the new non-participating life department (after the establishment of the necessary reserves) for transfer to the non-can department in the same manner in which the profits from the old non-participating life department are used.

During the period of perhaps three years, absorb the cost of acquisition of new non-participating business out of the amounts transferable to the non-can department as profits from all other departments of the New Company as herein provided.

Do the same with respect to cost of acquisition of new participating business, except to the extent that such cost is ordinarily absorbed by smaller dividends payable to participating holders during the initial period during which such costs are large.

Use the profits of the new participating life department in payment of dividends to the holders of new participating life insurance policies without any contribution whatever to the non-can department, in order to develop a strong going concern and to that extent to approximate the result of a really mutualized company.

Restrict the total amount of the new participating life insurance to a reasonable proportion, as in the Commissioner's plan, to not exceed the amount of the new non-participating life insurance, provided, however, that the proportion may be changed by unanimous consent of the board of directors of the New Company.

Comments on operation. It is understood that on new life business, for every $1.00 of premium receipts during the first year, $1.60 is expended, as a result of commissions, and medical examination, etc. Assuming $50,000,000 of new business per year, and an average premium rate of $30.00 per $1,000 of insurance, the loss would approximate the sum of $900,000. In a going concern, such expense is absorbed by profits on old business. Similarly, therefore, the expense would have to be absorbed out of general profits of the New Company, and to that extent would be deducted from the amounts transferred to the non-can department. Under the Commissioner's plan, these costs of acquisition would have to be absorbed, so that if deduction would have to be

made therefor under the plan herein proposed, the same deduction would have to be made under the Commissioner's plan, and thereby make smaller the amount available for restoration of non-can benefits.

Method Of Operation Of The Non-Can Department.

Discontinue writing of any new non-can business.

Adopt a more rigorous policy of thorough investigation of the validity of disability claims, both past and future.

Give to the active non-cans two options:

(1) To pay premiums at existing premium rates as set forth in their policies, with benefits reduced to scale in Commissioner's plan, but with restoration of benefits to extent available from transfers to non-can department, as hereinafter set forth.

(2) To pay the old plus an additional premium at a flat rate of approximately $20 to $25 per year for each $100 of monthly disability indemnity provided in the policy, for a period of ten years, with full benefits payable, but with reduction of amount of the additional premiums after the first year, arising by transfer of profits from other departments to the non-can department, as hereinafter set forth.

Carry group insurance on lives of all non-cans who elect the second option, and set aside out of the actual surplus of the company enough money at the initiation of the plan, to cover the unpaid additional premiums of those active non-cans who die during the ten year period.

Use existing surplus to extent necessary, by setting aside reserve to cover unpaid additional premiums of those who elect the second option and who reach the age limit mentioned in their policies during the ten year period.

Defer the receipt of disability benefits by those active non-cans who elect the second option and who become disabled during the ten year period, to the extent that such postponement is necessary to absorb the unpaid additional premiums collectible during the ten year period.

Apply the profits from the old non-participating life department, the old participating life department (to the extent of the 10%) the accident and health department, and the new non-participating life department, in restoration of non-can benefits for those who exercise the first option, and in reduction of the additional premium payments paid by those who exercise the second option, in the proportions (as between the two classes) in which the total premiums payable by those in the first class bear to the total premiums (both old and additional) payable by those who elect the second option. Deduct there-

3205 from, however, any deficit arising in the new life departments arising from cost of acquisition of new business. Prorate share of profits allocable to first class, among the disabled members in proportion to their respective reductions of benefit under the Commissioner's scale. Prorate share of profits allocable to second class, among all members, in proportions to their premiums paid.

Give to those non-cans as hereinafter provided,
3206 non-assignable participation certificates, carrying interest from date of issuance, to share in the distribution of the $1,000,000 stock of the company, at the end of ten years, unless the stockholders have restored solvency prior to the expiration of five years.

To those non-cans electing the first option and who never become disabled, issue no certificates.

To those non-cans electing the first option and
3207 who do become disabled, issue certificates at the time of each disability payment, in the amount of the deficiency in the payment after using the share of profits available for that purpose.

To those non-cans electing the second option, issue at time of payment of premiums in the increased amount, participation certificates for the amount of the premiums actually paid, after crediting the amounts applied out of profits in reduction of those increased premiums.

At end of ten year period, distribute the $1,000,000 stock of the company pro rata among all certificate holders in proportion to the face of the certificates with interest at 6% per annum, unless stockholders of Old Company did not restore solvency during the five year period. Provide that certificates are not a liability of the company, other than for the issuance of the $1,000,000 stock already in existence.

Reason for the option. The report of convention examination shows an insolvency of $17,000,000. There are only two ways of curing any insolvency, either by decreasing liabilities (as proposed by the Commissioner), or by increasing assets, (as herein proposed). Reduction of benefits, besides, creating a discrimination as against active non-cans, in favor of life policy holders, runs counter to the primary purpose for which insurance companies are operated, namely, to provide insurance in order to render a public benefit.

Allegedly the insolvency of the Old Company exists in the fact that there is an insufficient reserve in the form of assets available to pay non-can claims in the future as they accrue. It will be noted that in so far as the ability to pay claims of already disabled non-cans is concerned, the reserve of $19,643,031.00 necessary therefor will be amply covered by the assets to be transferred to the Non-Can Department in the sum

of approximately $25,000,000, so that the major concern is with respect to the reserve necessary for the active Non-Cans.

The necessity for a reserve arises from the fact that the actuaries calculate on the one hand the present worth of the future premiums expected to be received from the active non-cans who are of varying ages and who will continue to pay premiums for various periods of time, some of whom will die, others of whom will become disabled and may with some risk, cease to pay premiums if their disability indicates they will never recover, and on the other hand the actuaries calculate the present worth of the anticipated disability payments to be made to the non-cans now active, but some of whom will become disabled. If the present worth of the future premiums does not equal the present worth of the future disability payments, the balance must exist in the form of assets at the present time, which must draw interest year by year and which together with the income therefrom, will close the gap. The actuaries calculate this deficiency at $24,685,977.00 as the amount necessary to have on hand now in order to close the gap.

Under the Commissioner's plan, the method of closing the gap (without comments on the discrimination thereby arising) is to leave unaltered the present worth of the future premiums by

3214 requiring that the old premium rate be continued in order to retain any benefits, but to decrease liabilites, to-wit, the present worth of the future disability payments, by scaling down the amounts payable, to the various percentages set forth in his plan. That is the Commissioner's method of closing the gap, so that no reserve in the form of present assets will be necessary, the payment of the premiums year by year being sufficient to make the payments on the disability claims pay-
3215 able in the reduced amount to the active non-cans as their claims accrue.

But it will at once be apparent that the gap can similarly be closed by increasing the present worth of the anticipated future premium receipts if the premiums are increased in the proper and sufficient amount.

The vice of the Commissioner's plan lies not only in its failure to carry out the primary pur-
3216 pose of an insurance company in affording full protection, but it has the covert purpose of creating a situation of fear and uncertainty in the minds of non-cans who will be reluctant to face the uncertainty of full restoration and who will therefore become discouraged on account of the reduced benefits and thus cause them to lapse. The power entrusted to the Board of Directors to use their discretion to create a "profitable going concern," even at the expense of restoration, has the tendency to compel more and more non-

3217 cans to lapse, especially during the period immediately following the initiation of the Commissioner's plan. Those non-cans who live at a distance and can not familiarize themselves with the financial condition of the company or with the extent to which restoration is being made, will tend to lapse by reason of the uncertainty. The inevitable result, therefore, is to reduce the reserves on account of those who lapse, and, in a short time, when restoration in full is possible
3218 to those who have the tenacity to remain with the company, the stockholders are in a position to recapture a profitable going business free from the obligations incurred by the issuance of the non-can policies. That undoubtedly is the hidden reason for the active support of the Commissioner's plan by many of the stockholders.

The advantage, therefore, of the plan herein proposed, in so far as non-cans are concerned, is that certainty of full benefits replaces uncertainty
3219 if the additional premiums are calculated in order to produce the result of a sufficiency of assets, regardless of whether profits are made in the other departments, and in the last analysis the result must be the same financially, because whatever profits could be used for restoration under the Commissioner's plan, could be used in reduction of additional premiums under the plan herein proposed.

3220 Discussion of willingness of active, healthy non-cans to pay additional premiums. The prospect of a lifetime of disability has actuated non-cans in the past to pay their premiums, year by year, even though they have in fact suffered no disability. The older the non-can becomes, the more desirable is the insurance. As hereinafter shown, the total outstanding disability indemnity is around $9,000,000 per month, and, as the total disability payments are around $4,-
3221 500,000 per year, or $375,000 per month, it will be seen that, roughly speaking, about 4% of the non-cans draw benefits, or about 1 in 25. If any one non-can knew positively that he would not be the one out of the 25 that might become disabled, he would never pay premiums to insure against the contingency. But the individual non-can does not know whether he will be the one to become disabled, but he has been willing to pay nevertheless, just as one insures against ac-
3222 cidental death. Many agents and policy holders characterize the disability insurance as their most valuable insurance, and the lapse rate is reported at about 4% per year.

Much is said about "adverse selection against the company," in connection with this insurance. It is suggested that not only is the argument overemphasized, but whatever strength there is to the argument is equally applicable to the Commissioner's plan. In the case of a man threat-

3223 ened with a disabling malady, certainly he would not cease his premium payments, even under the Commissioner's plan, and if there is any lapsation at all, it would be on the part of the healthy one. The larger, therefore, that the group of healthy, premium paying non-cans could be made, the less would be the proportion of claimants, and the more beneficial to the company would be the continuous receipt of premiums from such group. Now what has the tendency to make that
3224 group the largest? Reduction of benefits, with the uncertainty of restoration conduces toward lapse on the part of the healthy non-cans, whereas maintenance of full benefits tends to prevent their lapse, and consequently to prevent the decrease in premium receipts from them. The same motive that has actuated the healthy non-cans to pay in the past, continues to operate to induce them to pay in the future, because it is protection that they want even though there may
3225 be only 1 chance in 25 that they will ever draw benefits. It therefore becomes merely a question of cost and the natural reaction of a healthy non-can is to consider that if benefits in the reduced amount cost a certain amount, query whether the addition of the remaining benefit is not worth the price that it may cost.

It is reported that there are about 49,000 non-cans, and Professor Mowbray, Consulting Actuary for the Commissioner tabulates the monthly

3226 disability indemnities payable (if all were disabled) as follows:

Date of Policy Issuance	Amount per month
1918 to 1921	$1,827,522
1921 to 1926	2,480,820
1926 to 1929	3,259,960
1929 to 1931	776,007
1931 to 1932	687,610

3227 Total, roughly $9,000,000 monthly or $120,-000,000 yearly. Total disability payments in 1935 were reported at $4,528,186.10. Assuming the 49,000 as the number of the non-cans, the average monthly disability indemnity is about $185 per month. It will also be noted that for every dollar of monthly disability indemnity ($9,000,000), if two dollars were paid in cash into the company, the insolvency of $17,000,000 would be completely cured. If every non-can
3228. therefore, would pay $200 in cash to the company, for every $100 of monthly disability indemnity he carries, the company would be solvent on the figures of the Report of Convention Examination. The instantaneous acquisition of $17,-000,000 from stockholders, or from non-cans, is out of the question. But if every non-can paid $200 with interest over a period of ten years for every $100 of monthly disability he carries, the insolvency could be cured. His additional

3229 premium would therefore be $20 for the first year plus 3½% interest on his deferred payments of $180 or an additional $6.30 for the first year. Under the plan, a non-can paying the old flat rate of $20.00 would pay an additional $20.00 plus the $6.30, or a total of $46.30 and those insuring more recently would be subject to the same additional premium if they desired to insure under the second option.

Under the plan proposed, if each and every
3230 non-can exercised the second option, and if each and every non-can paid the full additional premium with interest for the first year, the additional income available to the non-can department in the first year would be the $1,700,000 plus interest of over $500,000,—a quite enormous increase. However, ignoring those who may prefer the first option, and considering that all non-cans exercise the second option, not all of the non-cans would remain alive during the
3231 entire ten years to continue their installments of additional premiums, and some also would become disabled year by year and likewise not pay additional premiums throughout the ten years. Indeed, some of the non-cans would die during the first year of the plan, and would not pay even the first of their ten additional premiums. The deficit arising from cessation of premium payments by those who become disabled can be cared for by a de-

3232 duction of their total unpaid additional premiums, from the amounts first becoming due on their disability claims. Thus, if a non-can has a $100 monthly indemnity, pays 9 additional premiums, and becomes disabled in the tenth year, instead of receiving $100 at the end of his 90 day elimination period, he would receive only $80.00. Similarly, if he becomes disabled in the first year without paying any additional premium, he would have his deficiency of $200 deducted, or
3233 have to wait an additional two months. ~~The hardship thus arising can be alleviated by setting aside a portion of the original surplus, for that purpose.~~

Coming next to the non-cans who may die during the ten year period, only a rough outline of the operation of the plan can be given. Non-cans are of all ages, but the majority at the present time are between 40 and 48 and originally took out their policies at a time when they had
3234 already assumed family responsibilities and desired protection from the contingency of disability. The American Experience Table, starting with 100,000 at age 10, shows 76,106 alive at age 40, with 765 dying before 41. For the 49,000 non-cans, therefore, the number dying, according to the table, and assuming 40 years as the average age of all non-cans, would be roughly 500 between age 40 and 41. But the experience of the company shows on general life policies an

experience rate of about 60% of the table which would give a figure of 300 dying between 40 and 41. For purposes of safety, let us assume that 400 non-cans will die during each of the ten years. It can safely be assumed that the 400 dying during the first year would not all die at the beginning of the year but that their deaths would be spread throughout the year, and that half of them would pay their first year's additional premium but that the other half would not. Remembering that the average policy is for $185.00 and that it would take $2 for every dollar of indemnity to cure the deficit, the average policy-holder would have to pay $370 by way of additional premiums (plus interest). The 400 that would die during the first year would thus cause a shortage of 400 times $370.00 or around $150,000, less the few thousand dollars paid by those dying during the first year after having paid the first, and first only, of their ten additional premiums. Assuming that another 400 die during the second year, the shortage on their account would be less than the figure applicable for those dying during the first year, because those dying in the second year would have paid their first year's additional premium. In all, one could compute the total shortage during the ten years at perhaps $750,000, or, for safety, at $1,000,000, due to a rising death rate as the group of 49,000 arrives at a higher attained age

year by year. This deficit could be taken care of by an appropriation at the outset, of enough of the present surplus to cover the shortage in the premiums receipts mentioned. However, although that might be necessary under rigid insurance regulations, it is apparent that there could be group insurance on the term basis for the entire group of 49,000, which would require only annual premiums, and the amount of these premiums could be absorbed by using so much of the profits of the New Company proposed to be transferred to the Non-Can Department from the other departments as might be necessary to insure in an outside company, but such insurance in an outside company would be unnecessary as the New Company is itself in the insurance business.

It is a needless digression to discuss how a non-can shall exercise his option, other than to say that two premium notices can be sent to him, one on the old premium rate with reduced benefits and another showing the total of his old plus the additional premium (including the interest) on the full benefit basis. His payment of one or the other establishes his exercise of option. But, if he does exercise the second option, it must be clear that the present worth of the future premium receipts of the company on account of the non-cans is thereby increased by enough to take care of all of the insolvency if

3241 all non-cans exercise the second option. It is quite as proper to compute the present worth of these additional premiums as to compute the present worth of the ordinary premiums, none of which are sure to be paid.

If some of the non-cans exercise the first option, then the present worth of the future disability payments is reduced, and pro tanto, the insolvency is cured, and if the other non-cans exercise the second option, then the present worth
3242 of the future premiums is increased, and pro tanto, the insolvency is cured.

Considering the status of the holder of a policy issued from 1931 to 1932 at age 35, where the benefits under the first option are reduced to 65%, and who continues to pay the premium of $39.50 specified in his policy for $100 of monthly disability indemnity, the proposed additional premium of $20.00 (plus interest) is about proportionate to the additional
3243 benefit. For the $39.50 he would get $65.00 and for $20.00 extra he would get the remaining $35.00. If he had attained an age of over 35 years at time of issuance, his premium is larger than $39.50 so that for the extra $20.00 he would be getting the extra $35.00 per month at less unit cost. Vice versa, if he was under 35, his extra $35.00 per month would cost proportionately more than the $65.00 under his reduced benefit.

3244 If it be argued that profits under the first option would raise the benefits above $65.00 in the case mentioned in the preceding paragraph, it is similarly true that the same profits can be used to reduce the $20.00 additional premium payments, and under the second option there is the tremendous advantage of payments of disability benefits in full from the outset of the plan. This is a matter of extreme importance to those in the earlier groups, to whom a restora-
3245 tion of $40.00 per month out of profits, above the $20.00 guaranteed, would still leave them behind the group already guaranteed $65.00 per month.

Moreoever, if it is worth while for non-cans to stay in the picture at all with their reduced benefits, it is likewise true that it is similarly worth while to stay in the picture by paying additional premiums because their extra cost is quite reasonable in comparison with their extra
3246 benefits, and they have accomplished the fundamental object of protection to the full extent, even if there were no profits at all available to reduce their additional premium payments. If the healthy non-can who insured at 35 years of age in 1932 reinsures at $65.00 per month for the premium payment of $39.50, then he has every reason to pay his extra premium for the extra $35.00 of benefit. Elaboration of the figures involved is given in order to meet fully the

3247 argument that it is only the non-cans who secretly know of an oncoming disability that would be willing to pay extra premiums. As pre-previously set forth, if a non-can is healthy and does not fear disability, and is willing to accept $65.00 (to say nothing of accepting $20.00) then he has every motive to get the full $100 for the extra premium, if profits are mandatory to use either in restoration of benefits or in reduction of additional premiums.

3248 The next development of the plan proposed, lies in the use of the profits payable from the Old Non-Participating Life Department, the Old Participating Life Department (to the extent of the 10%) and the Accident and Health Department, to the Non-Can Department, in restoration of benefits, and particularly in reduction of the amount of the additional premiums payable after the first year by those who exercise the second option given to non-cans. If the present
3249 worth of the future premiums has been increased by reason of the liability of non-cans to pay those additional premiums during the period of ten years after they exercise their option, if they are to retain any benefits, that present worth is not lessened if in fact their actual payments of the additional premiums are lessened by the use of profits from other departments of the company. The use of such profits from other departments is a means of taking advantage of

3250 the difference between the two legal ideas of insolvency, one, insufficiency of assets to pay liabilities, and the other, inability to pay obligations as they become due. Under the Commissioner's plan, profits may be used to restore benefits to non-cans, and in the plan proposed, profits must be so used to the extent herein set forth.

If the non-cans are guaranteed that profits must be used by application on their additional premiums after the first year, they have every
3251 inducement to initiate the plan by paying additional premiums during the first year, with the hope that profits will substantially lessen their future premium payments. If profits are not in sufficient amount to make such substantial diminutions, then they will not be of sufficient amount to produce much restoration of benefits under the Commissioner's plan.

A better understanding of the purpose of the
3252 plan herein proposed can be obtained by canvassing the figures set forth in the Report of Convention Examination. In 1935 non-can premiums, were $3,557,740.95 and non-can disability payments, $4,528,186.10, although the figure of $5,580,621.10 appears in the Supplemental Report. However that may be, if, under the ten year additional premium plan herein proposed, something like $1,700,000 additional would be received during the first year as the additional premium, to say nothing of the extra money as

3253 interest on the balance of the $17,000,000, the disability payments made to non-cans who were active on December 31, 1935, but who become disabled in the first year, would have to exceed $1,700,000 plus the interest, before any situation of insufficiency of assets would present itself. The $4,528,186.10 paid in 1935 represents payments on claims that have arisen over all previous years, so that to require $1,700,000 for claims arising in the one year 1936 would mean
3254 that such claims would have to amount to almost 35% of the claims arising in all previous years.

The use of certain assumptions will further illustrate the provisions proposed. If the holders of non-can policies to the extent of ¾ of the total monthly indemnities of around $9,000,000 elect the second option, and the other ¼ elect the first option, the additional premium payments by those who elect the second option would be around $1,300,000 plus interest the first year.
3255 Just what the regular or old premiums of these same persons would be, would depend on the rates payable under their policies. An assumption could be made that these regular premiums, instead of being ¾ of the total present premium income of around $3,500,000 would be only $2,000,000 and that the other ¼ would pay the other $1,500,000 of the total $3,500,000. Those electing the first option would pay $1,500,000 and those paying the old plus the additional premiums

3256 would pay $2,000,000 plus the $1,300,000 plus interest. Ignoring interest, their total would be $3,300,000 the first year. Premiums from both classes would be $3,300,000 plus $1,500,000 or $4,800,000. If the profits for the first year were $1,440,000, then 1500000/4800000 would be used for restoration, or $450,000 and the other $990,000 in reduction of the additional premiums in the second year, payable by the ¾ who elect the second option. It will be seen that the 3257 $990,000 would make a very sizable reduction in the additional premiums of $1,300,000 plus interest payable in the second year, and, if profits are forthcoming, be a powerful inducement to persuade all non-cans to start the plan and elect the second option. Those non-cans who pay the higher old premiums would share in this reduction to a greater extent that those who insured between 1918 and 1921, as hereinafter provided.

3258 At this point it will be illuminating to consider the premium rates charged on policies issued during various years, using age 35 at time of issuance and a 90 days elimination as a basis:

1918 to 1921	$20.00	$1,827,522	(monthly
1921 to 1926	$24.50	2,480,820	indemnity)
1926 to 1929	$29.50	3,259,960	
1929 to 1931	$36.50	776,007	
1931 to 1932	$39.50	687,610	
1932 to 1935	$52.00		

3259 A flat increase in the premium not proportionate to existing premium rate would create a discrimination between the early policies and the late policies, but the earliest policies are more valuable in that they carry the same benefits, and indeed can be kept in force until a later age than the later policies. The total premiums now paid by the various classes of policies according to year of issuance are not set forth in either the Report filed in court or the Supplemental Re-
3260 port of Convention Examination. An increase of $20.00 annually for 10 years would, fall more heavily on the later policy holders, and provision can be made to alleviate that situation by prorating the profits transferred by the other departments to the Non-Can Department, in the proportions that premiums are payable by the various holders. Thus if the holder of a policy issued in 1918 at $20.00 exercises option No. 1, his proportion is on $20,00 and if the holder of
3261 a policy issued in 1922 exercises option No. 2, his proportion (assuming age 35 at time of issuance) is on $24.50 plus the $20.00 additional premium, or on $44.50, etc. Thus, the holders paying premiums at the higher rates, will get a larger reduction in their additional premiums after the first year of the plan. As between restoration of benefits to those who exercise the first option, and reduction of additional premiums payable by those who elect the second option,

3262 the same general segregation of the profits could be made. This affords an inducement to pay the increased premiums because if ¼ of the total premiums are those paid by persons who elect the first option, only ¼ of the total profits go to restoration, and the other ¾ to reduction of additional premiums.

An examination of the method of computing the reserves for the active non-cans is important for an understanding of the plan proposed, (as
3263 well as an understanding of the Commissioner's plan).

If premium receipts year by year were sufficient to pay disability claims, no reserve would be necessary. The actuaries undertook to calculate the anticipation of the company as to those particulars, and divided the results into groups depending on time of issuance of policies. Adding 7% as the expense of investigation of claims, etc. they computed that the present worth of the
3264 disability payments to be made on the group of policies issued from 1918 to 1921 was $17,831,626, but when it came to the report filed in court, took 100/135 of that figure, or roughly $13,200,000. They computed the present worth of the anticipated premiums, less commissions to be paid to agents, etc., and in the case of the same group, determined that $2,119,493 was the present worth of these future premium receipts. The results are tabulated:

3265		Present worth Future Disability payments	Reduced to 100/135 (Approximate only)	Present Worth of Future Premiums
	1918 to 1921	$17,931,626	$13,200,000	$ 2,119,493
	1921 to 1926	$16,763,388	12,400,000	3,853,411
	1926 to 1931	$19,725,474	14,600,000	8,535,553
	1931 to 1932	4,369,376	3,230,000	2,711,762
3266		$58,689,864	$43,430,499	$17,220,219
			17,220,219	
			$26,210,280	
	Add reserve set up on policies issued after 1932		88,567	
			$26,298,847	
3267	Deduct share of unearned non-can premiums shown as unearned premium reserve on page 13 of Report ($2,903,928)		1,612,830	
			$24,686,017	Necessary Reserve

The figure is shown slightly different on page 13 of the Report. Incidentally with respect to policies issued after 1932, the present worth of

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3268 the claims was found to be $2,729,689, which was less than the present worth of the premiums in the sum of $3,021,185.

In course of time a profit from them could be anticipated, despite the apparent reduction to 90% in the scale of benefits proposed on them by the Commissioner.

The figures available for policies issued between 1926 and 1931 do not show segregation in order to ascertain the exact amount subject to
3269 the percentages of benefits set forth in the Commissioner's plan. That is, on policies from 1926 to 1929 the proposed reduction is to 45% of benefits, and on policies from 1929 to 1931, to 55%. Assuming an average of 50% the present worth of the reduced benefits would be as follows in comparison with the present worth of the future premiums on the same groups:

3270

	Present worth old benefits		Present worth reduced benefits	Reduction benefits	Present worth future premiums
1918 to 1921	$13,200,000	20%	$ 2,640,000	$10,500,000	$ 2,119,493
1921 to 1926	$12,400,000	35%	$ 4,340,000	$ 8,060,000	$ 3,853,411
1926 to 1931	$14,600,000	(45% & 55%—average at 50%	$ 7,300,000	$ 7,300,000	$ 8,534,553
1931 to 1932	$ 3,230,000	65%	$ 2,099,500	$ 1,130,500	$ 2,711,762
1932 to Date	$ 2,729,689	90%	$ 2,456,100	$ 273,589	$ 3,021,185
		Roughly	$18,835,600		$20,240,404

3271 Not only is there an anticipated pickup of over $1,000,000 according to this rough computation, but the *polcies* issued from 1926 to 1931 show monthly benefits as follows:

1926 to 1929	$3,259,960	(45% basis)
1929 to 1931	776,007	(55% basis)

50% as an average for the two groups is therefore probably too high, and a lesser rate than 50% for the average would reduce the total
3272 present worth of the disability payments below $7,300,000 and would to the extent of such decrease, correspondingly increase the pickup mentioned.

If the general theory is correct, then the option ought to be given and if the computations are not correct, the correct ones can be ascertained. One reason for the comparatively small
3273 size of the additional premiums necessary, lies in the fact that although there is a reserve allegedly necessary in the amount of over $24,000,000 for the active non-cans the total deficiency in the company is only $17,000,000. In addition there is the possibility of appreciation in assets, offset, perhaps, by losses on mortgage loans and real estate, for which some reserves have already been set up. Likewise, there is the

3274 possibility of salvage in suits against directors for declaration of dividends during 1934 and 1935, to the extent of almost $1,000,000.

Rights of Stockholders

For the period of five years, permit stockholders to recapture the Old Company by transfer of all assets of the New Company to the Old Company, on condition that stockholders of the Old Company not only provide capital for all
3275 reserves then necessary for continuation of future business at that time, but also pay off the participation certificates issued to non-cans who received less than full disability payments, for the amount of the deficiency thereof, and the participation certificates issued to non-cans who are not disabled but who paid additional premiums, to the extent of the amount of such additional premiums with interest at 6%.

3276 In event stockholders do not then rehabilitate the Old Company, issue the existing stock of the New Company in the sum of the $1,000,000 to the holders of the participation certificates pro rata, and continue the obligation of the New Company to so devote profits of the various departments for transfer to the Non-Can Department to restore benefits to those who elect the

3277 first option, and in reduction of premiums of those who elect the second option.

Comments. The entire risk of loss falls on the non-cans, and they should have the benefit if by their sacrifices, liquidation is to be avoided that would be ruinous to stockholders, and life holders. Under the proposed plan, all life policies are quite as safe as under the Commissioner's plan, and they contribute nothing to assist in any

3278 rehabilitation.

Stockholders should not have the present right to contribute capital, unless they contribute sufficient to restore the insolvency in full. If they have the right to contribute $1,000,000, or any negligible sum, it creates a disproportion between the existing capital of $1,000,000 and such contribution, without adding at all materially toward the restoration.

3279 Management of the New Company

Have 15 members of the Board of Directors of the New Company chosen 5 by each of the following groups: stockholders, life holders and non-can holders.

Debar all directors who participated in the declaration of dividends in 1934 or 1935 from occupying any position as Director.

Hold the stock under a voting trust with equal representation as above indicated, until expiration of five years.

Comments. The stockholders should be represented because of their right to recapture within five years. The life holders should be represented to see that proper dividends are declared on their participating policies. The non-cans should be represented because of restoration of non-can benefits. All groups will be interested in economical management.

At the expiration of five years, the stockholders should cease to have representation on the board, unless they restore solvency in full, in which case life and non-can holders would cease to have representation, equally.

Respectfully submitted,

ROSCOE R. HESS
(Roscoe R. Hess)

Endorsed: Filed Oct. 10, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy.

D.11.

3283 [TITLE OF COURT AND CAUSE.]

Petition in Intervention and Appearance of Certain Policy Holders of the Pacific Mutual Life Insurance Company of California.

Come now Charles Ross Cooper, Irving H. Granicher, Raymond Vincent Knowles, Harry George Richard, Wilmot P. Rogers, John F. Hassler, Verne Reynolds Pentecost, Donald
3284 Vincent Nicholson, Horace Rowan Gaither and Hugh King McKevitt, owners and holders of non-cancellable income policies of The Pacific Mutual Life Insurance Company of California, and appear in the above entitled matter and intervene therein, and as and for such appearance and petition in intervention, specify and allege as follows:

3285 1. That said Charles Ross Cooper is the owner and holder of non-cancellable income policy numbered 2659704 issued by The Pacific Mutual Life Insurance Company of California under date of May 29th, 1919;

That said Irving H. Granicher is the owner and holder of non-cancellable income policy numbered 5513638 issued by The Pacific Mutual Life Insurance Company of California under date of April 15th, 1928;

3286 That said Raymond Vincent Knowles is the owner and holder of non-cancellable income policy numbered 5513673 issued by The Pacific Mutual Life Insurance Company of California under date of April 15th, 1928;

That said Harry George Richard is the owner and holder of non-cancellable income policy numbered 4638108 issued by The Pacific Mutual Life Insurance Company of California under
3287 date of May 15th, 1923;

That said Wilmot P. Rogers is the owner and holder of non-cancellable income policy numbered 4666014 issued by The Pacific Mutual Life Insurance Company of California under date of March 10th, 1926;

That said John F. Hassler is the owner and holder of non-cancellable income policy numbered 4669018 issued by The Pacific Mutual Life In-
3288 surance Company of California under date of May 26th, 1926;

That said Verne Reynolds Pentecost is the owner and holder of the following non-cancellable income policies issued by The Pacific Mutual Life Insurance Company of California, to-wit: numbers 4668070 and 4668071, which policies were issued under date of May 27th, 1926;

That said Donald Vincent Nicholson is the owner and holder of two (2) non-cancellable income policies issued by The Pacific Mutual Life Insurance Company of California in about the year 1923;

That said Horace Rowan Gaither is the owner and holder of non-cancellable income policy numbered 4641112 issued by The Pacific Mutual Life Insurance Company of California under date of August 13th, 1923;

That said Hugh King McKevitt is the owner and holder of non-cancellable income policies, to-wit: numbers 4608452, 4621872, 4623029 and 4623192 issued by The Pacific Mutual Life Insurance Company of California under date of August 30th, 1921;

That all of the policies mentioned in this paragraph are in full force and effect;

2. That the rehabilitation and reinsurance agreement attached to the petition of Samuel L. Carpenter, Jr., for approval of rehabilitation and reinsurance agreement filed in the above entitled matter is unjust, unfair and discriminatory against the owners and holders of non-cancellable disability income policies issued by The Pacific Mutual Life Insurance Company of Cali-

3292 fornia, including the intervenors mentioned in paragraph 1 hereof, and that said rehabilitation and reinsurance agreement discriminates unfairly and unjustly in favor of all other types of policy holders of said The Pacific Mutual Life Insurance Company of California.

3. That said rehabilitation and reinsurance agreement is unjust and unfair and discriminatory in favor of the holders and owners of non-cancellable disability income policies of The
3293 Pacific Mutual Life Insurance Company of California, who have filed or made claim under said policies prior to July 22, 1936, and that said rehabilitation and reinsurance agreement discriminates unfairly and unjustly against the holders of non-cancellable disability income policies of The Pacific Mutual Life Insurance Company of California who have not filed or made claim prior to July 22, 1936.

4. That this Honorable Court is without
3294 power or jurisdiction to approve, ratify or confirm the acts of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, acting as conservator herein, or approve, ratify or confirm said rehabilitation and reinsurance agreement, in that no adequate or proper showing has been made by said Samuel L. Carpenter, Jr., that there is a need for such rehabilitation, or that The Pacific Mutual Life Insurance Company of California was, at the time of

3295 the filing of said petition for approval of rehabilitation and reinsurance agreement, without sufficient reserve to adequately protect all types of policy holders and/or that said The Pacific Mutual Life Insurance Company of California was insolvent.

5. That said petition for approval of rehabilitation and reinsurance agreement does not show that the assets of The Pacific Mutual Life Insurance Company of California were inadequate
3296 to meet all types of obligations which might arise from all types of policies written by said company and in existence at the time of the filing of said petition.

6. That due, proper and adequate notice as required by law was not given to the owners and holders of policies of The Pacific Mutual Life Insurance Company of California and to all interested parties.

7. That said rehabilitation and reinsurance
3297 agreement is confiscatory and in violation of contract.

8. That said rehabilitation and reinsurance agreement is unfair, inequitable and against the best interests of all policy holders of The Pacific Mutual Life Insurance Company of California, and in particular said rehabilitation and reinsurance agreement is unjust, inequitable and against the best interests of the holders of non-cancellable disability income policies of The Pacific Mutual Life Insurance Company of California.

3298 9. That said rehabilitation and reinsurance agreement discriminates unfairly and unjustly in favor of non-cancellable policy holders of certain premium classes against non-cancellable policy holders of other premium classes of The Pacific Mutual Life Insurance Company of California.

10. That the percentage of the original monthly benefits assumed by Pacific Mutual Life Insurance Company, intervenor in the
3299 above entitled matter, in the different classes of non-cancellable policy holders, is discriminatory and inequitable and without cause or justification.

11. That said rehabilitation and reinsurance agreement is unfair, unjust and inequitable in other and further particulars.

12. That the said Insurance Commissioner of the State of California and the above entitled court acted without jurisdiction or right
3300 in the purported sale of the assets of The Pacific Mutual Life Insurance Company of California to the Pacific Mutual Life Insurance Company.

13. That due and proper notice was not given to all interested parties with reference to said purported sale.

14. That said purported sale by Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, of the assets of The Pacific Mutual Life Insurance Company of California

to the Pacific Mutual Life Insurance Company, was not made in accordance with law, is mere sham, and, in fact, no sale whatever.

Wherefore, your said intervenors pray that said rehabilitation and reinsurance agreement be held and adjudicated to be unfair, inequitable and unjust; that said sale of said properties and said assets of The Pacific Mutual Life Insurance Company of California be adjudicated void and of no effect, and that it be determined that The Pacific Mutual Life Insurance Company of California is not insolvent, and is capable of continuing business as it did prior to July 22, 1936, and for such other and further relief as may be meet and proper in the premises.

HUGH KING MCKEVITT,

Attorney for Said Intervenors, Charles Ross Cooper, Irving H. Granicher, Raymond Vincent Knowles, Harry George Richard, Wilmot P. Rogers, John F. Hassler, Verne Reynolds Pentecost, Donald Vincent Nicholson, Horace Rowan Gaither and Hugh King McKevitt.

Verified.

Endorsed: Filed Oct. 16, 1936, at 2 p. m. L. E. Lampton, county clerk; by A. G. Stanham, deputy. D.11.

3304 [TITLE OF COURT AND CAUSE.]

Answer of Respondents E. B. Tilton, Frank L. Stebbins, A. J. Russell, Richard E. Smith, Walter D. Fansler, Frank H. Higgins, and John T. O'Connell to Petition for Approval of Rehabilitation and Reinsurance Agreement and in Response to Order to Show Cause Made and Entered Herein September 25, 1936.

3305 For answer to said petition and in response to said order to show cause, said respondents E. B. Tilton, Frank L. Stebbins, A. J. Russell, Richard E. Smith, Walter D. Fansler, Frank H. Higgins and John T. O'Connell admit, deny and allege as follows, to-wit:

I.

That these answering respondents aforesaid are each holders of non-cancellable health and
3306 accident policies made, executed and delivered to each of them by said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, bearing the numbers, issued under the dates, and for the indemnity rate for total loss of time as set forth in the respective columns following, to-wit:

3307

Number of Policy	Name of Insured (Respondents Herein)	Date of Issuance of Policy	Indemnity Rate for Total Loss of Time
5512192	E. B. Tilton	December 14, 1927	$200
5512073	Frank L. Stebbins	January 12, 1928	100
2668887	A. J. Russell	March 10, 1920	900
4618189	Walter D. Fansler	June 11, 1921	500
5525461	Frank H. Higgins	January 31, 1929	50
5512024	Frank H. Higgins	January 3, 1928	250
5611507	John T. O'Connell	October 6, 1930	100
5611508	John T. O'Connell	October 6, 1930	100
5520314	Richard E. Smith	September 19, 1928	200

That the premium on each of said policies has
3308 been paid in full to and accepted by said respondent, The Pacific Mutual Life Insurance Company, of California, a corporation, and each of said policies since the respective dates of their respective issuance, at all times prior to, and on the 22nd day of July, 1936, has been and still is in full force and effect.

II.

That said respondents E. B. Tilton, Frank
3309 L. Stebbins and John T. O'Connell reside in Cook county, state of Illinois; respondents A. J. Russell and Richard E. Smith reside in the city of San Francisco, state of California; respondents Walter D. Fansler and Frank H. Higgins reside in the city of Minneapolis, state of Minnesota. All of said respondents except John T. O'Connell file this answer both in their capacity as individual holders of such policies and also as members forming a committee representing other holders of said policies who have requested

3310 said committee to represent them in these proceedings, which other policyholders reside in the states of Alabama, California, Illinois, Indiana, Iowa, Minnesota, New Jersey, New York, Ohio, Washington, and Wisconsin. That said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, has issued a large number of said policies, to-wit: in excess of 35,000; that said policies are held by practically as many policyholders widely scattered
3311 through most of the United States and several foreign countries. That the provisions of said so-called non-cancellable policies are substantially identical and all of said policyholders represent a class of persons too numerous to join individually in answering said order to show cause. That this answer is filed not only on behalf of the policyholders named herein, but on behalf of all others similarly situated who may join in the presentation of the objections hereinafter urged.

3312 III.

That each of the said policies held by your respondents contains a provision in substantially the following language: "The insured shall have the right at the time of such expiration (one year from the date of the issuance of the policy) to renew this policy for the term of (specified) years by the payment of a like premium on the (date of issuance) in each succeeding year, provided, however, that this policy shall not be re-

3313 newed beyond its anniversary date nearest the sixtieth birthday of the insured." That in some instances the policies provide for a different birthday beyond which the policy cannot be so renewed, but in the case of each of these said respondents such date has not yet been reached but is several years hence in the future.

IV.

That at the present time none of these answering respondents is disabled in accordance with
3314 the terms of said policies, except said respondent John T. O'Connell. That said respondent John T. O'Connell suffered disability on or about August 1, 1936, in that he then suffered hemorrhage from duodenal ulcer which totally incapacitated him in his profession of physician and surgeon; that said disability still continues and will continue for several months hence; and that for such disability, despite due proof of claim, he has received no payments from any source.

3315

V.

That each of said policies of these answering respondents and all other non-cancellable income health and accident policies issued by said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, were each issued as the general obligations of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation.

That a full, true and correct copy of said policy issued to said respondent E. B. Tilton is

3316 hereto attached, marked Exhibit "A", and made a part hereof. That the provisions of each of the said policies of each of said other answering respondents are in substantially the same form as said Exhibit "A".

VI.

That further answering said petition and said order to show cause, these said answering respondents allege that said Rehabilitation and Reinsurance Agreement attached to said petition
3317 and therein marked Exhibit "A" should not be approved by the order of the above entitled court and that the court should not make any of the other orders set forth in said order to show cause in paragraphs 1 to 9 thereof, inclusive, upon the following grounds, to-wit:

(a) That said Rehabilitation and Reinsurance Agreement attached to said petition and marked Exhibit "A" and referred to in said order to show cause is unfair, inequitable and,
3318 as respects these answering respondents and all other holders of non-cancellable income policies similarly situated, is in point of law a fraudulent conveyance in that it provides for the payment in full or assumption in full of all claims, obligations and liabilities against the assets of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, except claims, obligations, and liabilities owing by said respondent corporation to these answering re-

spondents and all other similarly situated non-cancellable income policyholders, which payment and assumption in full of all other such obligations, liabilities and claims is made possible solely and entirely at the expense of and injury to these answering respondents and all other holders of non-cancellable income policies similarly situated, in violation of law and of the legal rights of these answering respondents and all other holders of non-cancellable income policies similarly situated.

(b) That said Rehabilitation and Reinsurance Agreement is unfair and inequitable and, with respect to these said answering respondents and all other holders of non-cancellable income policies similarly situated, constitutes in law a proposal and attempt to hinder, delay and defraud them and each of them of their rights as creditors of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, in that said proposed Rehabilitation and Reinsurance Agreement seeks to transfer and deliver all of the assets of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, to a new corporation heretofore formed out of part of the assets of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, which new corporation while assuming all other outstanding obligations, claims and liabilities of said respondent, The Pacific Mutual Life Insur-

ance Company of California, a corporation, nevertheless purports under and by virtue of the terms of said Rehabilitation and Reinsurance Agreement to assume but a part or portion only of the contractual obligation of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, to these answering respondents and to all other non-cancellable income policyholders similarly situated.

(c) That said Rehabilitation and Reinsurance Agreement constitutes a conveyance in fraud of the rights of these answering respondents and all other non-cancellable income policyholders similarly situated, in that it is designed to and will make it possible for said petitioner and the stockholders of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, to eliminate a large portion of the said holders of non-cancellable income policies for much less than the legal value of their said policies, and thereby enable the stockholders of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, to buy back into their former old position at a price made low at the sole expense of the said holders of non-cancellable income policies.

(d) That if the said rehabilitation and reinsurance sections of the Insurance Code of the state of California be construed by the court so as to permit the making of such preferences

among policyholders of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, as are contained in said rehabilitation and reinsurance agreement, then such sections of said Insurance Code and other pertinent provisions of the law of the state of California permitting such change in the contractual obligations of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, are unconstitutional and void, in that they are in violation of the provisions of article I, section 10, and of the Fourteenth Amendment of the Constitution of the United States of America and of the provisions of the Constitution of the state of California, article 1, section 13, and article 1, section 16, prohibiting the taking of property without due process of law and prohibiting the passing of any law which impairs the obligation of a contract.

(e) That if the pertinent provisions of said Insurance Code and other laws of the state of California be so construed by the court as to permit the establishment of preferences between policyholders of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, in violation of their said contract rights, by the simple act of said petitioner under the provisions of the conservator or liquidation or rehabilitation or reinsurance sections of said

Insurance Code, then the conferring of such powers upon said petitioner by the Legislature of the state of California is void as an unconstitutional delegation of legislative powers in violation of article 3, section 1, of the Constitution of the state of California.

VII.

That these answering respondents and all other holders of non-cancellable income policies similarly situated are each interested in the assets of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, which assets provide security to all classes of policyholders holding all classes of insurance written and issued by said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, without discrimination, preference or priority.

VIII.

That said Rehabilitation and Reinsurance Agreement discriminates against these said answering respondents and all holders of said non-cancellable income policies similarly situated and against said non-cancellable income policies, and gives priority and preference to all other classes of insurance written and issued by said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, over non-cancellable income policies held and owned by these answering respondents and held and owned by

all other non-cancellable income policyholders similarly situated, which said discrimination, preference and priority is contrary to the contractual obligation of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, contained in each of said non-cancellable income policies.

IX.

That the people of the state of California, by and through the duly elected, qualified and acting Legislature of the state of California, did enact chapter 145, Statutes of California, 1935, designated, known and cited as the Insurance Code. That said Insurance Code was duly enacted and adopted by the authority of the state of California, and said Insurance Code has been and will be enforced by an officer of the state of California, to-wit, said petitioner, Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, as conservator of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation. That the state of California, by the provisions of said Insurance Code, has conferred authority upon said petitioner as said Insurance Commissioner to enforce the provisions of said Insurance Code.

That the state of California, acting by and through said petitioner, said Insurance Commissioner, as such conservator, and acting by and through the Superior Court of the state of Cali-

fornia, in and for the county of Los Angeles, a court of record, duly created and constituted by the people of the state of California and existing, will, if said proposed Rehabilitation and Reinsurance Agreement is executed by said petitioner, said Insurance Commissioner as conservator, and approved by the order of said court, discriminate against and deny to these said answering respondents and all other holders of said non-cancellable income policies similarly situated the equal protection of the laws, and will deprive them, and each of them, of their said property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America and in violation of article 1, section 10, of the Constitution of the United States of America, and in violation of article 1, section 13, of the Constitution of the state of California, and in violation of article 1, section 16, of the Constitution of the state of California.

X.

That the said proposed act of said state officer, to-wit, said petitioner as said Insurance Commissioner, as said conservator, in proposing that said Rehabilitation and Reinsurance Agreement be executed by said persons named as parties

thereto and approved by said court is unreasonable, arbitrary and capricious.

XI.

That these answering respondents allege that by virtue of section 1057 of the Insurance Code of the state of California, said petitioner, said Insurance Commissioner, as said conservator, in these proceedings is deemed to be a trustee for the benefit of all creditors and other persons interested in the estate of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, against whom these proceedings are pending.

That said petitioner, as said Insurance Commissioner, as said conservator, has violated his oath of office and his statutory duty to act impartially as trustee for the benefit of all creditors and other persons interested in said estate of said respondent, by proposing said Rehabilitation and Reinsurance Agreement, and that said petitioner, therefore, should be removed by this court and that the court appoint a receiver or, in the alternative, a new conservator who will act as an impartial trustee for said respondent.

XII.

For answer to paragraph IV of said petition, these answering respondents have no informa-

3340 tion or belief upon the subject sufficient to enable them to answer the allegations contained therein commencing on page 2, line 19, following the ";" with the words "that by" and ending on line 27 with the word "obligations," and basing their denial on that ground, generally and specifically deny each and every allegation therein contained.

XIII.

3341 For answer to paragraph V of said petition, these answering respondents have no information or belief upon the subject sufficient to enable them to answer the allegations therein contained, commencing on page 3, line 5, with the words "your petitioner" and ending on line 9 with the words "Old Company," and basing their denials on that ground generally and specifically deny each and every allegation therein
3342 contained.

XIV.

For answer to paragraph VII of said petition, these answering respondents have no information or belief upon the subject sufficient to enable them to answer the allegations therein contained commencing on page 4, line 13, with the words "and on July 22, 1936," and ending on page 5, line 2, with the word "organization," and basing

3343 their denial on that ground generally and specifically deny each and every allegation therein contained.

XV.

For answer to paragraph VIII of said petition, these answering respondents deny that the proposed Rehabilitation and Reinsurance Agreement attached to said petition, marked Exhibit "A" and made a part thereof, affords to these 3344 answering respondents or all or any other noncancellable income policyholder or holders similarly situated, any measure or opportunity of protection or any protection, or the protection to which they are entitled by reason of said noncancellable income policies.

Wherefore these said answering respondents respectfully pray that said Rehabilitation and Reinsurance Agreement be not approved by this 3345 court in any manner whatsoever and that said order to show cause, made and entered herein September 25, 1936, be discharged. That said petitioner, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, be removed by the order of this court as conservator of said respondent, The Pacific Mutual Life Insurance Company of California, a corporation, and that the court appoint a receiver of said respondent in his place.

3346 For such other and further relief as to the court may seem meet and proper in the premises for the protection of these said answering respondents and all other holders of said non-cancellable income policies similarly situated.

BELL, BOYD & MARSHALL,
By DAVID A. WATTS,
KENYON F. LEE,
Attorneys for Said Answering Respondents.

3347 State of Illinois, County of Cook—ss.

E. B. Tilton, being by me first duly sworn, deposes and says, that he is one of the answering respondents in the above and foregoing matter; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

3348

E. B. TILTON.

Subscribed and sworn to before me this 14th day of October, 1936.

(Seal) MARION R. STEIN,
Notary Public in and for the County of Cook, State of Illinois.

3349 State of Illinois, Cook County—ss.

I, Michael J. Flynn, county clerk of the county of Cook, do hereby certify that I am the lawful custodian of the official records of notaries public of said county, and as such officer am duly authorized to issue certificates of magistracy, that Marion R. Stein, whose name is subscribed to the annexed jurat, was at the time of signing the same, a notary public in Cook county, duly
3350 commissioned, sworn and acting as such and authorized to administer oaths and to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in said state of Illinois, all of which appears from the records and files in my office; that I am well acquainted with the handwriting of said notary, and verily believe that the signature to the said jurat is genuine.

3351 In testimony whereof, I have hereunto set my hand and affixed the seal of the county of Cook at my office in the city of Chicago, in the said county, this 14 day of October, 1936.

[Seal] MICHAEL J. FLYNN,
County Clerk.

3352 [EXHIBIT A.]

NON-CANCELLABLE INCOME POLICY

This policy provides indemnity for loss of life or time through accidental means, and for loss of time by sickness; to the extent herein provided.

Founded 1868

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

3353 (Herein Called Company)

Hereby Insures * * * Earle B. Tilton * * * (herein called Insured and described in the Application), subject to all provisions and limitations herein contained:

Against loss of life resulting directly and independently of all other causes, from bodily injury effected during the term of this policy solely through accidental means; and

3354 Against disability commencing while this policy is in force and resulting from bodily injury effected through accidental means; and against disability commencing while this policy is in force and resulting from sickness; as follows:

Loss of Life

Part A. The Company will pay * * * Ten Thousand * * * Dollars should loss of life as defined above result within one hundred and twenty days from date of the accident.

3355 Total Loss of Time

Part B. (1) The Company will pay indemnity at the rate of * * * Two Hundred * * * Dollars per month for the period throughout which disability described above consists of continuous, necessary and total loss of all business time, but no indemnity shall be paid under this Part B, or under Parts D, E or F for the first* three months of any period of such total loss of all business time, provided, however, that indem-
3356 nity will be paid for the entire period of such total loss of all business time immediately succeeding a period of partial disability for the entire period of which benefits are payable under the provisions of paragraph (2) of this Part B.

Partial Loss of Time

(2) The Company will pay indemnity at the rate of one-half of the amount per month specified in paragraph (1) of this Part B, for any period or periods throughout which disability de-
3357 scribed above does not consist of total loss of all business time, but consists of continuous inability to prosecute important daily business duties, provided that in each instance the period of such partial disability immediately succeeds a period of total loss of all business time for which indemnity is payable under the provisions of paragraph (1) of this Part B, and provided further that indemnity for such period or periods of partial disability will not be paid for more than

3358 a total of six months during any continuous disability.

Hospital Indemnity

Part C. Should the Insured, by reason of bodily injury or sickness covered by this policy, be under treatment and also be resident in a licensed hospital, the Company will pay, in addition to whatever other indemnity may be payable under this policy, monthly indemnity at the rate of 25% of the amount specified in paragraph
3359 (1) of Part B for the continuous period of such residence and treatment, commencing at the first day thereof and not exceeding three months, throughout which the Insured suffers a continuous, necessary and total loss of all business time, but such indemnity will not be paid for more than one period as the result of any one accident or disease or for more than one period during any continuous disability.

3360 Loss of Both Hands, Both Feet, Hand and Foot or the Sight of Both Eyes

Part D. Should the Insured suffer, as a direct result of such injury or such sickness, the loss of both entire hands by complete severance at or above the wrists, or the loss of both entire feet by complete severance at or above the ankles, or the loss of one entire hand by complete severance at or above the wrist and one entire foot by complete severance at or above the ankle, or the irrecoverable loss of the entire

3361 sight of both eyes, he shall be deemed to have sustained a permanent disability resulting in continuous, necessary and total loss of all business time and the Company will pay indemnity at the rate per month specified in paragraph (1) of Part B as long as he shall live, or;

Loss of One Hand or One Foot

Part E. Should the Insured suffer, as a direct result of such injury or such sickness, the loss of one entire hand by complete severance at
3362 or above the wrist, or the loss of one entire foot by complete severance at or above the ankle, the Company will pay indemnity at the rate per month specified in paragraph (1) of Part B for the period during which such loss causes disability resulting in continuous, necessary and total loss of all business time, and at the termination of such disability will consider such loss to have caused a permanent disability of 25%, and will pay the Insured, as long as he shall
3363 live, monthly indemnity at the rate of 25% of the amount specified in paragraph (1) of Part B, or;

Loss of the Sight of One Eye

Part F. Should the Insured suffer, as a direct result of such injury or such sickness, the irrecoverable loss of the entire sight of one eye, the Company will pay indemnity at the rate per month specified in paragraph (1) of Part B for the period during which such loss causes dis-

3364 ability resulting in continuous, necessary and total loss of all business time, and at the termination of such disability will consider such loss to have caused a permanent disability of 10%, and will pay the Insured, as long as he shall live, monthly indemnity at the rate of 10% of the amount specified in paragraph (1) of Part B.

*No indemnity except Hospital Indemnity is payable under this policy for the specified first part of any period of disability.

3365 Standard Provisions

1. This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured or contracts sickness after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing
3366 pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.

If the law of the state in which the Insured resides at the time this policy is issued requires

that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the state official having supervision of insurance in such state, then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such state prior to the occurrence of the loss for which the Company is liable.

2. No statement made by the applicant for insurance not included herein shall void the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.

4. Written notice of injury or of sickness on which claim may be based must be given to the

Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. In event of accidental death immediate notice thereof must be given to the Company.

5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at its Home Office, 501 West Sixth Street, in the City of Los Angeles, California or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

7. Affirmative proof of loss must be furnished to the Company at its said office in case

3373 of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

8. The Company shall have the right and opportunity to examine the person of the Insured when and so often at it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an 3374 autopsy in case of death where it is not forbidden by law.

9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid immediately after receipt of due proof.

10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each month during the 3375 continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured.

12. If the Insured shall at any time change his occupation to one classified by the Company

as less hazardous than that stated in the policy, the Company, upon written request of the Insured and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the state in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

17. If the Insured shall carry with another company, corporation, association or society other insurance covering the same loss without giving written notice to the Company, then in that case the Company shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like

indemnity in all policies covering such loss, and for the return of such part of the premium paid as shall exceed the pro rata for the indemnity thus determined.

18. Upon the payment of claim hereunder any premium then due and unpaid or covered by any note or written order may be deducted therefrom.

19. If a like policy or policies previously issued by the Company to the Insured be in force concurrently herewith, making the aggregate indemnity for loss other than that of time on account of disability in excess of $50,000.00, or the aggregate indemnity for loss of time on account of disability in excess of $250.00 weekly, the excess insurance of either kind shall be void and all premiums paid for such excess shall be returned to the Insured.

20. The insurance under this policy shall not cover any person under the age of eighteen years nor over the age of sixty years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

Additional Provisions

21. This insurance does not cover, (1) any disability for which the Insured is not necessarily and regularly attended by a legally qualified physician other than the Insured; provided, however, that this requirement shall be waived in the event such attendance is declared by medical au-

thority satisfactory to the Company to be unnecessary; (2) suicide, sane or insane, or any attempt thereat, sane or insane; (3) loss of life or disability resulting wholly or partly, directly or indirectly from (a) bodily injury sustained or sickness contracted while the Insured is engaged in military or naval service in time of war, (b) bodily injury or sickness caused by war or by any act of war, (c) bodily injury, fatal or non-fatal, sustained, or sickness contracted by the Insured while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith, or while operating or handling any such vehicle or device, (d) bodily injury sustained or sickness contracted except while the Insured is within Canada or Europe or the United States (not including Alaska, Panama Canal Zone or the insular possessions of the United States), or while traveling between them by regular lines of passenger conveyance (not including aerial conveyance).

22. The allowance of indemnity under the provisions of either of paragraphs D, E or F shall proportionately reduce the monthly indemnity payable for all other loss or disability thereafter occurring.

23. After the first twelve months of disability, no indemnity shall be payable for any period

of disability during which the Insured is not continuously within the United States (not including Alaska, the Panama Canal Zone or the insular possessions of the United States) unless a written permit to reside elsewhere be granted by the Company.

24. All premiums on this policy are due and payable in advance at the Home Office of the Company, but may be paid to any authorized agent or manager of the Company producing receipts signed by the President, a Vice President, the Secretary or an Assistant Secretary, and countersigned by such authorized agent or manager. A grace of thirty-one days shall be granted for the payment of every premium after the first, during which time the insurance hereunder shall continue in force. After any default in payment of premium this policy may be reinstated as provided in Standard Provision Number 3 at any time within six months from the date of such default on written application by the Insured to the Home Office of the Company and the payment of the defaulted premium, provided the Insured shall with such application submit evidence of insurability satisfactory to the Company.

25. Indemnity for disability will not be paid under this policy at a rate in excess of the aver-

age earnings of the Insured for the period of time that he has been actually employed during the two years immediately preceding the commencement of the disability for which the Company is liable, and all premiums paid during said two years for that portion of the disability indemnity in excess of the amount of such earnings will be returned upon request of the Insured. The Insured shall have the right to reduce any or all of the indemnities of this policy and upon his request and temporary surrender of the policy for endorsement, the Company will endorse it, making such reduction of indemnities and a proportionate reduction in premium.

26. At any time during the life of this policy, if the Insured changes his occupation to one different from that stated in this policy, the Company hereby agrees upon the surrender of this policy to issue in lieu thereof upon the written request of the Insured, a new policy containing the same provisions as this policy except a change in the amount of the benefits payable, the new policy to provide such an amount payable for loss of life and disability as the premium paid for this policy will purchase at the rates but within the limits fixed by the Company for such different occupation.

If the age of the Insured has been mis-stated, any amount payable under this policy shall be that amount which the premium paid would have purchased at the rate fixed by the Company for the Insured's correct age; except, that if the true age of the Insured at the time of application for this policy is over fifty-five, the policy shall be null and void and the Company shall return all premiums received less any indemnity paid prior to the ascertainment of the correct age.

27. The Insured is by occupation a Vice President of Bank classified Preferred by the Company.

28. The beneficiary under this policy is Della Lawrence Tilton whose relationship to the Insured is that of Wife. Any assignment of this policy must be in writing. The Company shall not be deemed to have notice of any assignment unless nor until acknowledgment of said notice shall have been endorsed on the policy and signed by an executive officer of the Company. The Company shall not assume responsibility for the validity of any assignment. Any change of beneficiary under this policy shall take effect on the endorsement of the same on this policy and not before.

29. The annual premium for this policy is * * * Ninety * * * Dollars and the

policy expires one year from its date. The Insured shall have the right at the time of such expiration to renew this policy for a term of 18 years by the payment of a like premium on the 14th day of December in each succeeding year, provided, however, that this policy shall not be renewed beyond its anniversary date nearest the sixtieth birthday of the Insured. Insurance under this policy is effective in consideration of the payment in advance of the premiums herein provided for and in further consideration of the statements made in the application for this policy, copy of which application is attached hereto and is hereby made a part of this policy. The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made with intent to deceive shall bar all right to recovery under this policy. No provision of the charter, constitution or by-laws of the Company not herein set forth shall be used in defense of any claim arising under this policy. Failure to comply with any of the provisions of this policy shall render invalid any claim under this policy.

In Witness Whereof, The Company has, by its proper officers, signed this Contract in the City of Los Angeles and caused same to be counter-

signed by its authorized Agent or Manager, as of the Fourteenth day of December, 1927 twelve o'clock noon, Standard Time at the place of the Insured's residence.

S F McClung
Secretary

George J. Cochran
President

Examined
JB

Countersigned J W Smith
Authorized Agent or Manager

6

Hospital Indemnity Supplement No. 5146511

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

Accident Department

Should the Insured, by reason of bodily injury or sickness covered by the policy to which this Supplement is attached, suffer a continuous, necessary and total loss of all business time and also be under treatment and be continuously resident in a licensed hospital, the Company will pay, in addition to the Hospital Indemnity payable under said policy, 75% of the amount per month provided in said policy for total loss of all business time for such portion of the period of such continuous residence and treatment as comes within the first three months of the disability causing it but Hospital Indemnity will not be paid under either or both said policy and this Hospital Indemnity Supplement for more

than one period as the result of any one accident or disease, nor for more than one period during any continuous disability.

This Hospital Indemnity Supplement is issued in consideration of the payment of an additional annual premium of Ten and no/100 Dollars, to be paid at the same time as is the premium for said policy, and it takes effect upon the date of its issuance as regards Hospital Indemnity on account of bodily injury, and six months after said date as regards Hospital Indemnity on account of sickness. It expires concurrently with said policy and is subject to all provisions of said policy not inconsistent herewith.

Attached to and made a part of Policy No. 5512192 issued to Mr. Earle B. Tilton.

In Witness Whereof, The Pacific Mutual Life Insurance Company of California has, by its proper officers, signed this Hospital Indemnity Supplement in the city of Los Angeles and caused same to be countersigned by its Authorized Agent or Manager, as of the 14th day of December, 1927, twelve o'clock noon, Standard Time, at the place of the Insured's residence.

S F McClung
Secretary

George J Cochran
President

Examined
JB

J W Smith
Authorized Agent or Manager

3403 No. 5512192

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

Non-Cancellable Income Policy

Form A 382

Renewable to Age Sixty

Issued To

Earle B. Tilton

This policy provides indemnity for loss of life
3404 or time through accidental means, and for loss of time by sickness; to the extent herein provided.

No indemnity except Hospital Indemnity is payable under this policy for the first part specified herein of any period of disability.

Please Read Your Policy

Application for Insurance—Accident Department

3405 THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

I hereby apply for Non-Cancellable Income Insurance, to be based on the following representations and on the representations that I shall make in answer to the questions to be asked by the Company's Medical Examiner in continuation of this application.

1. What is your full name? (Please print)
Earle B Tilton

3406 2. Where do you reside? No. 2531 Jackson Av Street
Town Evanston State Ills

3. Where and when were you born, and what is your age? Town Tiltonville. State or Country Ohio Month June Day 15 Year 1886. Age at Nearest Birthday 41 Years

4. What are your occupations? (Describe fully) Vice President

3407 5. What are the duties required of you? (Describe fully) Office

6. What is the name of your employer? The Bank of America

7a. How long in present occupation? 3 yrs. Years

b. What was former occupation? Chase Nat'l Bk of N. Y.

8. What is the location of your employer's place of business? No. Madison & La Salle Street Town Chicago State Ills

3408 9. Whom do you designate as beneficiary under policy applied for, and what relationship is such beneficiary to you? (Please Print) If for Disability Benefits only, write "None" Della Lawrence Tilton Relationship Wife

10 Does the disability indemnity applied for in this and other companies or associations together with that under other insurance now held by you exceed your average monthly earnings? No.

3409 11. Are your personal habits correct and temperate? Yes.

12. Have you any Life, Permanent Total Disability, Accident or Sickness Insurance in this or any other company or association? (If in this Company, give policy numbers. State whether Accident and Sickness Indemnity is weekly or monthly.)

	Life Insurance		P. T. D.
3410 Company	Amount	Year Issued	Amount
Equitable Life	10,000	12-1926 Ord	100.00
	15,000	Term 12-1927	150.00
Mass Mut	20,000	Ord 12-1926	Old Form

Accident and Sickness Insurance

Company	Prin. Sum	Acc. Ind.	Sick Ind.
3411 Zurich			
H & A	15,000	50	50

#

13. Have you ever made application for life, accident or sickness insurance upon which you have not been notified of the action taken, or has any application ever made by you for life, accident or sickness insurance been declined or postponed, or has any policy of accident or sickness insurance issued to you

3412 been cancelled or renewal refused by this or any other company or association? (Give particulars) No

14. Have you ever received or been refused compensation for accidental injuries or sickness, or have you any claim now pending? (Give particulars) Yes in Zurich. Burned Index Finger 10-3-27—$16.00 Doctors Fee —PD. Electric Iron

3413 15. Have you ever had or have you now any bodily or mental infirmity or deformity (including hernia and rupture), or have you impaired hearing, any disease of either eye, lost a limb or the sight of an eye, or are you in any respect maimed or in unsound condition mentally or physically? (Give particulars) No

3414 16. Have you in contemplation—any hazardous undertaking—any special journey—or any traveling outside the United States? (Give particulars) No

17. Do you agree that the falsity of any answer in this application for insurance or any answer made to the Company's Medical Examiner in continuance of this application for insurance shall bar the right to recover thereunder if such answer is made with intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the Company? Yes

3415 18. Do you agree that the Company may make in the space provided "For Home Office Endorsements Only" such correction in or addition to this application as may be required, subject, however, to your ratification, which shall be conclusively presumed by your acceptance of any policy issued thereon? Yes For Home Office Endorsements Only A383—Part I—#9—None.

19. Do you agree that if entire amount of annual premium for the insurance applied for

3416 is not paid at time of making this application, there shall be no liability on the part of the Company under this application unless nor until a policy is issued and delivered to you and entire amount of such annual premium actually paid during your lifetime and while you are in good health and free from injury, and do you further agree that if entire amount of such annual premium is paid to the Company's agent at time of making this application, insurance (subject to

3417 the provisions of the Company's regular policy of the form applied for) shall be effective from date of medical examination for said insurance, provided the Company in its judgment shall be satisfied as to your insurability under form of policy applied for, on date of such examination, and do you further agree that if the Company shall not be so satisfied, entire amount of premium paid, without interest, shall be returned? Yes

3418 20. Do you expressly waive, on behalf of yourself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined you, or who may hereafter attend or examine you, from disclosing any knowledge or information which he thereby acquired? Yes.

3419 Dated at Chicago Ills. this 13 day of Jan 1928
Signed in the presence of F. F. Fulton Soliciting Agent

Earle B. Tilton
Applicant's own signature in full

Statement to Be Signed by Applicant for Settlement With Agent

No. 475048 I Hereby Declare that I ha e paid to F. F. Fulton Agent of The Pacific Mutual
3420 Life Insurance Company of California One Hundred and no/100 Dollars, and that I hold his receipt for same, written on receipt form detached from, and corresponding in date and number with this application.

Date 13— Cash—100/00, 1928
1/13/28—H Hooper.
Earle B. Tilton.
Applicant's own signature in full

CLERK'S COPY

Vol. IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON AND ALFRED F. MACDONALD, PETITIONERS,

vs.

SAMUEL L. CARPENTER, JR., INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED APRIL 2, 1938.

CERTIORARI GRANTED MAY 16, 1938.



BETTIN, PAINTER & WAIT,
Rives-Strong Bldg., Los Angeles, Cal.,
Attorneys for Appellants and Respondents Vernon Bettin and William George Dickinson.

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State Bldg., Los Angeles, Cal.;

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Title Insurance Bldg., Los Angeles, Cal.;

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Russ Bldg., San Francisco, Cal.,
Attorney for Respondent Charles Ross Cooper et al.

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Attorney for Respondents Rupert B. Turnbull et al., for Themselves and for Other Non-Cancellable Policyholders Similarly Situated and for Francis Adams for Himself and for Other Non-Cancellable Policyholders Similarly Situated.

MANIERRE & CUTHBERTSON,
Garfield Bldg., Los Angeles, Cal.,
Attorneys for Respondents George W. Manierre and B. Robert Getts on Their Own Behalf and on Behalf of All Similarly Situated Policyholders.

KENYON F. LEE,
H. W. Hellman Bldg., Los Angeles, Cal.,
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Board of Trade Bldg., Los Angeles, Cal.,
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First Trust Bldg., Pasadena, Cal.,
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Rowan Bldg., Los Angeles, Cal.,
Attorney for Respondents David Lynn Openshaw et al.

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Bank of America Bldg., Los Angeles, Cal.,
Respondent in Pro. Per.

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REX HARDY,
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SHATTUCK, DAVIS & STORY,
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D. M. ELLISON,
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COSGROVE & O'NEIL,
Rowan Bldg., Los Angeles, Cal.,
Attorneys for Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

A. A. CARMICHAEL,
Montgomery, Alabama,
Attorney for Respondents J. Parker Evans, on Behalf of Himself and All Other Holders of Active Life Non-Cancellable Income Policies Issued in the State of Alabama Who May Wish to Join With Him in the Proceeding.

3421 Questions to Be Asked by the Medical Examiner.

(This examination must be made in private by a regularly appointed Medical Examiner, no Agent or other third person being present) In continuation of and forming a part of my Application for Insurance to The Pacific Mutual Life Insurance Company of California.

1. A. Where have you resided during summer and winter of last ten years? A. Caldwell N. J. 1918-1925 Chicago Ill 1925-1928

3422

B. Have you ever changed or been advised to change your occupation or residence to benefit your health? B. No

2. A. Do you drink wine, spirits, malt liquors or other alcoholic beverages? If so, what kinds, how much, and how frequently? A. No

B. Have you ever used them to excess? (Give particulars.) B. No

3423

C. Have you ever used opium, cocaine or any other drug? C. No

D. Have you ever taken treatment for liquor or drug habit? If so, when and where? D. No

E. If a total abstainer, how long so? E. Always

F. Have you ever engaged in the manufacture or sale of alcoholic beverages? When and how long? F. No

3424 3. A. Has any one in your family committed suicide or suffered from Epilepsy or Insanity? (Details each such case.) A. No

B. Has any one in your family or in your immediate household ever suffered or died of Consumption or any other contagious disease? (Details each such case.) B. No

4. A. Has any Insurance or Assessment Company or Fraternal Society ever refused
3425 you Insurance, or limited or postponed your Application? (Details each such case.) A. No

B. Have you ever applied for Insurance without getting the Policy? B. No

C. Have you any other Application now pending? C. No

D. Have you ever applied for a pension or Government Compensation? If so, give the cause for each such claim. D. No

3426 5. Have you ever had or been treated for:
A. Apoplexy, Paralysis, Epilepsy, Dizziness, Mental Derangement? Yes or No A. No

B. Asthma, Shortness of Breath, Chronic Cough, Spitting of Blood? B. No

C. Influenza, Pneumonia, Pleurisy, Bronchitis, Tuberculosis? C. No

D. Disease of Heart or Blood Vessels, Sunstroke, Nervous Prostration? D. No

E. Gastric or Duodenal Ulcer, Indigestion, Appendicitis, Piles, Fistula? E. No.

3427 F. Liver, Kidney or Bladder Disease, Sugar or Albumin in Urine? F. No

G. Colic, Gravel, Gall Stones, Jaundice, Malarial or other Fevers? G. No

H. Cancer, Tumor, Open Sores, Goitre, Enlarged Glands, Skin Disease? H. No

I. Locomotor Ataxia, Lumbago, Gout, Rheumatism, Syphilis? I. No

J. Difficulty with Sight or Hearing, Discharge from the Ear? J. No

3428 K. Have you ever had a surgical operation? K. Yes. Give name, history, date and duration of each disease, symptom or operation. My tonsils were removed in 1921—Dr. Lynch Polyclinic Hosp., New York. I had a septum operation in 1920.

6. Have you given full information about each disease, symptom or operation mentioned in Question 5 above, which you have ever had or been treated for? Yes

7. What injuries or illnesses, or treatments by
3429 or consultations with physicians or practitioners, have you had during last seven years?

Give particulars each Illness, Injury, Consultation or Treatment	Date	Duration	Result	Physician's Name and Address
Correction of deviated septum	1920	Short	Cured	Dr. Wheeler Jersey City, N. J.
La Grippe & Cold	1923	Few days	Cured	.....
1st degree burns right index finger	1927	1 day	Cured	.....

8. Has your weight in past year—Increased? No Diminished? No How much? No lbs.

3430 9. Are you now in good health? Yes.

10. Family Record?		Age if Living	State of Health; if not good, give full details	Age at Death	Cause of Death; give full details	Date of Death	How long sick
Father				70	Typhoid-Peritonitis	1920	Short
Mother				56	Cancer of Uterus	1913	1 yr.
Wife or Husband		35	Good				
Brothers	Number living (2)	47	(half) Good				
	Number dead (0)	37	Good				
Sisters	Number living (1)	44	(half) Good				
	Number dead (0)						

3431

Dated at Chicago Ill this 13th day of January 1928

Witness William D. Joch M. D.

Medical Examiner

Earle B. Tilton.

Applicant's own signature in full

Answers must be explicit and in the handwriting of the Examiner Check marks or dashes
3432 do not constitute an answer

Endorsed: Received copy of the within answer this 15 day of October, 1936. U. S. Webb, attorney general; John L. Flynn, deputy attorney general; Frank L. Guerena, Mitchell, Silberberg & Knupp, by Perry Price, deputy, attorneys for petitioner.

Filed Oct. 15, 1936, 3:45 P. M. L. E. Lampton, county clerk; by K. E. Lynch, deputy.

3433 [TITLE OF COURT AND CAUSE.]

Return to Order to Show Cause by the Respondents Rupert B. Turnbull, William Weisman, Francis Adams, and Lawrence Allen.

Come now Rupert B. Turnbull, William Weisman, Francis Adams and Lawrence Allen, for themselves and for other non-cancellable policyholders similarly situated, and for a return to the respective orders to show cause of date
3434 August 13, 1936, signed by the Honorable Henry M. Willis, judge of the above entitled court, to the order to show cause with respect to the rehabilitation, sale and transfer of assets and reinsurance plan and agreement, order to show cause on which is dated August 14, 1936, signed by the Honorable Henry M. Willis, judge, and with respect to the proposed rehabilitation, sale and transfer of assets and reinsurance plan and agreement of Samuel L. Carpenter, Jr., as Insur-
3435 ance Commissioner of the State of California, these respondents as a return thereto and each thereof first adopt the previous return to the order to show cause as filed herein, to-wit, the joint return of Rupert B. Turnbull, William Weisman and Francis Adams, and the return of Lawrence Allen, and make the same, each and every and all of the allegations thereof, and each and all of the denials therein contained, as a part of this return to the orders to show cause hereinbefore set forth.

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3436 Your respondents and each of them further object to the plan, sale and proposed transfer by the Insurance Commissioner on the following additional grounds:

That the law under which the petitioner Samuel L. Carpenter, Jr., seeks relief herein on behalf of some of the policyholders but not the non-cancellable policyholders, is a law which was adopted and came into being at a time subse-
3437 quent to the issuance of the respective policies of insurance issued by The Pacific Mutual Life Insurance Company of California to the respondents and each of them, to-wit, policies issued in the years 1921, 1922 and 1923; that these respondents and each of them, under the terms of the respective policies of insurance, had vested rights of contract, and the respondents and each of them have paid the annual premiums respec-
3438 tively due under their policies to The Pacific Mutual Life Insurance Company of California at all times since the issuance of said policies respectively in 1921, 1922 and 1923. That your respondents and each of them are not in default and have not been in default at any time under the terms of their respective policies. That the law under which the petitioner Insurance Commissioner seeks to deprive your respondents and non-cancellable policyholders similarly situated,

is a law which the Legislature of the state of California attempted to enact subsequent to 1923 and which, if applied herein, will be retroactive and deprive these respondents herein of their vested rights of contract, will deprive these respondents of their policies of insurance, will cause irreparable damage and injury to these respondents, for the reason that these respondents and each of them, by reason of the lapse of time and change of physical conditions of respondents and each of them, will be unable to and are unable to duplicate their insurance policies with The Pacific Mutual Life Insurance Company of California, and will be unable to and are unable to obtain other insurance. That the said act under which the petitioner Samuel L. Carpenter, Jr., seeks relief herein and the effect which he attempts to place upon said law and the results he attempts to accomplish in this court by said plan and sale, are contrary to the Fourteenth Amendment to the Constitution of the United States of America, contrary to the Constitution of the state of California, contrary to the Fifth Amendment to the Constitution of the United States of America, in that it attempts to deprive these respondents of their property without due process of law, that it attempts to deprive these respondents of their vested rights under contract.

3442 And these respondents and each of them further object to said proposed plan on the ground that the proposed plan and sale transfers to a certain class of policyholders the benefit of all of the assets of The Pacific Mutual Life *Insurance of* California including the good-will, which good-will and agency contracts are estimated by the petitioner Samuel L. Carpenter, Jr., to be of a value of not less than ten million dollars, and 3443 which your petitioners allege is a conservative figure to be placed upon said good-will. Your petitioners allege that the said good-will of the business sought to be sold is in excess of ten million dollars. That your respondents and those similarly situated are entitled to their actual pro rata of all the assets of The Pacific Mutual Life Insurance Company of California, including the good-will and intangibles of the business of said 3444 insurance company; that by said plan they have been deprived of their right to a distributive pro rata share; they are being deprived of the reserves created for their benefit; they are being deprived of their right to recover their portion of the reserves which the petitioner Samuel L. Carpenter, Jr., as Insurance Commissioner and as conservator has alleged have been wrongfully taken from the company in the form of an excess

3445 five million dollars in dividends declared, and concerning other assets some of which are now the subject matter of litigation instituted by said Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California and as the conservator of The Pacific Mutual Life Insurance Company of California to recover.

Wherefore, your petitioners pray that the proposed plan and sale and reinsurance plan as proposed by the Commissioner be denied, and that
3446 no plan which does not give unto the respondents and those similarly situated, to-wit, those holding non-cancellable policies, their proper share of the assets of the insurance company, be not confirmed, and that the proposed sale be not approved, and that unless some plan is proposed which will operate to give and grant to the non-cancellable policy holders that which is theirs by operation of law and by right, the court order a liquidation of the assets of the insurance com-
3447 pany and a pro rata distribution of the assets to the creditors and policyholders.

RUPERT B. TURNBULL.

Verified.

Served on all parties by mail October 16, 1936. Rupert B. Turnbull.

Endorsed: Filed Oct. 16, 1936, 4:23 p. m. L. E. Lampton, county clerk; by J. C. Gordon, deputy.

3448 [TITLE OF COURT AND CAUSE.]

Return on Order to Show Cause.
Henry B. Senn.

To the Parties Above Named and to Their Attorneys:

In response to the order to show cause, served by mail upon him, Henry B. Senn, holder of Noncancellable Policy No. 4659648 of defendant, dated June [illegible], 1925, Henry B. Senn objects to
3449 the approval of the proposed plan of rehabilitation referred to in said order to show cause, hearing on which is set for October 19, 1936, at 10 o'clock A. M., in Department 11 of said court, upon, among others, the following grounds:

I. That the court has no jurisdiction to consider or approve said plan in this summary proceeding or at all.

3450 II. That the said plan includes the turning over, in effect, to the directors of the old company under whose direction the conditions of insolvency arose, approximately two hundred million ($200,000,000.00) dollars in value of other people's property, which the record of these persons has demonstrated they are not fitted to handle.

III. That the proposed plan violates the rights of non-can policy holders to equal recog-

3451 nition and treatment with other creditors of the insolvent corporation.

IV. That the plan tends to deprive this objector of his vested rights as a creditor of the defendant, under his said policy, arising from his policy and for and because of existing disability due to a cardiac condition which has arisen since the date of the policy; which makes it now impossible for this objector to secure other disa-
3452 bility insurance.

V. That the said plan appropriates the value of lapses of non-can and other policies, which lapses would certainly result in great numbers from the operation of the plan for the benefit of stockholders who, through their agents, conducted the corporation into insolvency; and who are not entitled to preferential treatment over policy holders even if their agents have not vio-
3453 lated the Insurance Code, concerning which situation the facts have not been submitted, and concerning which the Insurance Commissioner ought to inform the creditors, the policy holders and this court.

VI. That the plan contemplates and its adoption would, in effect, absolve from responsibility for the amount of the deficit that produced the insolvency, the persons under whose management

3454 the deficit arose without reference to this court of the facts relative to the financial responsibility and the legal liability of the management of the defendant corporation and individuals composing it, for the deficit.

VII. That no reasoned statement from the standpoint of the interests of the policy holders has been presented why the plaintiff rejected the offer made to him to purchase the corporation
3455 and broke off negotiations for the purchase.

VIII. That the application of the Insurance Commissioner for approval of the proposed plan, acting in concert and in collaboration with the persons under whose direction the insolvency arose, which would preserve the stockholders' rights at the expense of the creditors and the policy holders of the insolvent corporation, and particularly upon the non-can policy holders,
3456 should be rejected.

IX. That the proposed plan is unjust and inequitable because its operation would result in the withdrawal from the assets of the corporation otherwise available for the payment of non-can policy holders practically all of the assets of the defendant, and limit recovery by non-can policy holders to a small part of the assets, arbitrarily, illegally and years after the payment of

3457 non-can policy premiums had gone into the general fund set aside by the management. That the basis of the segregation, the time when the management ascertained that the premium rates for non-can policies were insufficient, whether they took premiums and paid dividends after acquiring that knowledge, has not yet been brought to the attention of the court by the Insurance Commissioner.

3458 X. That it is a matter of general knowledge in the insurance world, and respondent is informed, appears from the "Alfred M. Best Insurance Reporter" for 1934, that dividends to stockholders of the old company, averaging 22% per year, had been paid over a prior period of 14 years; which said payments being made largely contemporaneously with the acceptance of premiums from this objector for his policy
3459 which it is now proposed to cancel because of a deficit largely produced while dividends which apparently should have been retained to carry out the contract were being paid out. The objector submits that these dividends should be reclaimed by the Insurance Commissioner in so far as it is possible to do so for the benefit of this objector and others similarly situated; and that the Insurance Commissioner should call to legal ac-

count the stockholders and their agents for these dividend disbursements; this objector further submits that the persons who caused these dividends to be paid and those who received them and the agents of these persons, should not be placed in control of the trust fund for the policy holders of this insolvent corporation.

These objections are filed as a return to the order to show cause aforesaid and to preserve the rights of this respondend, and without waiving his right to intervene in said action; or, in event the plan objected to be approved, to apply to any court of appropriate jurisdiction for a writ of prohibition.

Dated: October 16, 1936.

ALBERT E. COGER,
Attorney for Henry B. Senn.

Endorsed: Received copy of the within return this 16th day of October, 1936. U. S. Webb, attorney general; John L. Flynn, deputy; Mitchell, Silberberg & Knupp, attorneys for plaintiff.

Received copy of the within return this 16th day of October, 1936, ...,
attorneys for defendant.

Received copy of the within return this 16th day of October, 1936. .....,
attorneys for intervenor.

Filed Oct. 17, 1936, 9:34 a. m. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

3463 [TITLE OF COURT AND CAUSE.]

Response of George W. Manierre and B. Robert Getts, Respondents, to the Order to Show Cause Dated September 25, 1936.

Come now George W. Manierre of the city of Pasadena in said county of Los Angeles, and B. Robert Getts of the city of Los Angeles in said county, respondents to the order to show cause dated September 25, 1936, and heretofore entered herein, and answering said order to show cause
3464 on their own behalf and on behalf as well of all similarly situated policyholders of The Pacific Mutual Life Insurance Company of California, allege as follows:

I.

In this answer are used the definitions set forth in the rehabilitation and reinsurance agreement dated as of the 22nd day of July, 1936, mimeographed copy of which has been furnished to these respondents by the Commissioner.

3465

II.

Respondent George W. Manierre is the holder of non-can policy number 4623963, form A283, issued by the old company to this respondent on October 7, 1921, providing among other things for the payment of a disability benefit of $200.00 per month during the continuance of disability, after the first two weeks of such disability, in consideration of an annual premium of $130.00. which premium this respondent has paid to the old company for the period of fifteen years last

3466 past; liability for the monthly benefits of said policy being assumed by the new company under said rehabilitation and reinsurance agreement only to the extent of twenty per cent (20%) of such monthly benefits.

III.

Respondent B. Robert Getts is the holder of non-can policy number 4620607, issued by the old company to this respondent on August 14, 1921, providing among other things for the pay-
3467 ment of a disability benefit of $200.00 per month during the continuance of disability, after the first three months of such disability, in consideration of an annual premium of $45.00, which premium this respondent has paid to the old company for the period of fifteen years last past; liability for the monthly benefits of said policy being assumed by the new company under said rehabilitation and reinsurance agreement only to the extent of twenty per cent (20%) of such
3468 monthly benefits.

IV.

That respondents object to the making of orders ratifying, confirming and approving the acts and doings of the Commissioner, either as conservator or otherwise, as set forth in the paragraphs numbered 1, 2, 3 and 8 of said order to show cause, and to the making of orders authorizing and directing said Commissioner, as conservator or otherwise, as set forth in the paragraphs numbered 3, 4 and 5 of said order to show cause, and to the making and entry of

3469 orders, decrees or directions, as set forth in the paragraphs numbered 6, 7 and 9 of said order to show cause, and, specifically, to the making of orders ratifying, confirming and approving said rehabilitation and reinsurance agreement, and for causes of objection allege:

(a) That the old company is under a definite liability to each of these respondents because of its anticipatory breach of its contract with these respondents, as evidenced by the non-can policies 3470 held by these respondents, as aforesaid.

(b) That the new company, under the terms of said rehabilitation and reinsurance agreement, pays no valuable consideration for the assets of the old company, which, in pursuance of said agreement, are turned over to the new company; that the new company is in fact but a reorganization of the old company and, under the facts as set forth in the petition for approval of said rehabilitation and reinsurance agreement filed by 3471 said Commissioner, as conservator, can only take over and acquire said assets subject to the assumption of all of the liabilities of the old company, including the old company's liabilities to non-can policyholders.

(c) That the consummation of said rehabilitation and reinsurance agreement will be a constructive, if not an actual, fraud upon these respondents, and will hinder and delay them in the collection of their damages for breaches of contract by the old company.

3472 (d) That in said rehabilitation and reinsurance agreement no adequate provision is made for the protection of the rights and interests of these respondents, as holders of non-can policies, but that, on the other hand, these respondents and other holders of similar non-can policies are discriminated against in favor, and to the benefit, of holders of participating and non-participating life policies and of other classes of accident and health policies, to the extent that the assets 3473 of the old company transferred to the new company are to be held as reserves for the benefit of holders of policies other than non-can policies similar to those held by these respondents, to the great detriment of these respondents and others similarly situated, whereas all of the assets of the old company should, in equity and good conscience, be held for the payment of all of its liabilities and for the equal benefit and protection of all persons to whom it may be liable.

3474 (e) That the Commissioner, as conservator, is without power under the Insurance Code to enter into said rehabilitation and reinsurance agreement in substance as presented to the court as Exhibit "A" of his petition for the approval thereof.

(f) That an order made by the court approving said agreement and authorizing rehabilitation as therein provided, will be made in violation of section 1 of article XIV of the Constitution of the United States and in violation of section 13 of article I of the Constitution of California.

3475 (g) That the Insurance Code, insofar as it assumes to provide for the rehabilitation and mutualization of life insurers, with resulting discrimination between policyholders and impairment of the obligation of contracts held by certain policyholders, is in conflict with section 10 of article I of the Constitution of the United States and with section 16 of article I of the Constitution of California, and is unconstitutional and void.

3476 Wherefore, these respondents having fully answered said order to show cause, pray that said order may be forthwith discharged and that the court forthwith order the conservator to proceed to the liquidation of the old company upon such terms and conditions as may be adequate to fully preserve and protect the rights and interests of these respondents and of all other non-can policyholders similarly situated.

MANIERRE & CUTHBERTSON,

3477 By G. M. CUTHBERTSON,

Attorneys for George W. Manierre and B. Robert Getts, Respondents.

Verified.

Endorsed: Received copy of the within response this 16th day of October, 1936. Dep. Atty. Gen. John L. Flynn, attorney for S. L. Carpenter, Jr., Ins. Com., by Geo. Q. McNamara.

Filed Oct. 17, 1936, 10:19 a. m. L. E. Lampton, county clerk; by M. Zimmerman, deputy.

3478 [TITLE OF COURT AND CAUSE.]

Joint Answer and Objections of Interveners, Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans, to Petition for Approval of Revised Rehabilitation and Reinsurance Agreement, and to Order to Show Cause With Respect to Rehabilitation and Reinsurance.

Come now interveners, Dr. Arthur B. Allen,
3479 Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans, and for joint answer and objections to the petition for approval of revised rehabilitation and reinsurance agreement filed on September 25, 1936, and for joint answer and objections to order to show cause with respect to rehabilitation and reinsurance, which order was made on September 25, 1936, admit, allege and deny as follows, to-wit:

I.

3480 Interveners repeat, replead, reallege and adopt, to the same extent as though herein set forth in their entirety, each and every portion and part of the allegations and averments contained in their complaint in intervention, filed in the above entitled action on August 19, 1936.

II.

Interveners repeat, replead, reallege and adopt, to the same extent as though herein set forth in their entirety, each and every portion and part

of the allegations, denials and objections, which are made as and serve as a defense to and as objections to said revised rehabilitation and reinsurance agreement, to said petition for approval of revised rehabilitation and reinsurance agreement and to said order to show cause with respect to rehabilitation and reinsurance, which have been and which hereafter may be filed in the above entitled action, and which may be made at the hearings of said order to show cause and said petition, by other holders of non-cancellable income policies issued by the old company; provided, however, that by this adoption, these answering interveners do not approve or subscribe to any proposed plan of rehabilitation or reinsurance which may have been or which may hereafter be submitted by said other policy holders; and provided, further, that by this adoption, these answering interveners do not to any extent waive or recede from any of their contractual, constitutional or other rights established by their respective non-cancellable income policies issued by the old company.

III.

Interveners particularly object to the revised rehabilitation and reinsurance agreement upon the ground that, when it is compared with the original rehabilitation and reinsurance agreement, it is self-evident that, and it is alleged, upon information and belief, that the petitioner, Samuel L. Carpenter, Jr., Insurance Commissioner of the

State of California, has not made proper effort to submit to the above entitled court a rehabilitation and reinsurance plan which gives proper consideration to the rights of holders of non-cancellable income policies issued by the old company, and it is self-evident that, and it is alleged, upon information and belief, that said petitioner has adhered to the original scheme of depriving said non-cancellable income policy holders of their contractual, constitutional and other rights for the purpose of securing an inequitable advantage for holders of other classes of policies, particularly life policies, and for other creditors of the old company.

IV.

That said revised rehabilitation and reinsurance agreement does not, to any material extent, seek to protect or preserve the contractual, constitutional or other rights of holders of non-cancellable income policies, issued by the old company; and that unjust discrimination is proposed to be shown against such policy holders by said revised plan.

V.

That said revised rehabilitation and reinsurance agreement fails to provide an alternate schedule whereby the holders of non-cancellable income policies, issued by the old company, may elect to receive the full original monthly benefits provided in their respective policies by paying a

reasonably higher premium, in lieu of paying, as now provided in said revised rehabilitation and reinsurance agreement, the originally established premiums and securing only a percentage of the original monthly benefit; and that said revised rehabilitation and reinsurance agreement fails to provide that all sums in excess of the originally established premium rates which shall be paid by non-cancellable income policy holders pursuant to such alternate schedule shall be deposited in a special fund, and that such excess payments shall be refunded to the respective payors at the earliest date on which net profits derived by the carrier from its entire business operations shall make such refunding possible. That these answering interveners proposed to the petitioner, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, at the conferences of parties litigant in the above entitled matter held immediately preceding the filing of said petition and said revised rehabilitation and reinsurance agreement, that such an alternate schedule, together with said provisions relative to the establishment of a special fund and relative to said refunding, be included in any rehabilitation and reinsurance plan. That these answering interveners are informed and believe, and therefore allege, that the refusal of said petitioner to incorporate such an alternate schedule, together with said provisions relative to the establishment of a special fund and relative to said

refunding, in said revised rehabilitation and reinsurance plan, was prompted by his feeling that such alternate schedule and provisions might, in some slight degree, serve to jeopardize the interests of holders of other policies and other creditors of said old company, and that said petitioner has given no further consideration to such proposed alternate schedule or the said provisions relative to said fund and refunding, and has made no effort whatsoever to determine whether the anticipated injury to such other policy holders and creditors would, in fact, occur and if occurring, whether such injury would in any degree be proportionate to the injury which would be sustained by interveners and other holders of non-cancellable income policies in the event such an alternate schedule and such provisions relative to the establishment of said special fund and relative to said refunding should not be included in a rehabilitation and reinsurance plan. These answering interveners are informed and believe, and therefore allege, that the failure of said petitioner to properly consider such proposed alternate schedule and such provisions relative to the establishment of said special fund and relative to said refunding, was motivated primarily by his desire to deprive the non-cancellable income policy holders of their contractual, constitutional and other rights for the purpose of securing an inequitable advantage for holders of other classes of policies, particularly life policies, and for other creditors of the old company.

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VI.

These answering interveners particularly object to the revised rehabilitation and reinsurance agreement because of the failure therein to require that all future net earnings of the carrier be applied immediately toward the restoration of non-cancellable income policies.

VII.

Particularly answering paragraph IV of said petition, allege that they do not have knowledge,
3494 information or belief sufficient to enable them or either of them to answer the allegations therein contained, and because of such absence of knowledge, information and belief, and basing their answer on that ground deny, generally and specifically, each and every allegation therein contained and demand that strict proof be made thereof by the petitioner; except, however, they admit that commencing in the year 1918 said old company started issuing its so-called "Non-
3495 cancellable Income Disability Policy," and that in subsequent years the premium rates thereon were increased.

VIII.

Answering paragraph V of said petition, allege that they do not have knowledge, information or belief sufficient to enable them or either of them to answer the allegations therein contained, and because of such absence of knowledge, information and belief, and basing their answer on that

3496 ground deny, generally and specifically, each and every allegation therein contained and demand that strict proof thereof be made by the petitioner.

IX.

Answering paragraph VI of said petition, allege that they do not have knowledge, information or belief sufficient to enable them or either of them to answer the allegations therein con-
3497 tained, and because of such absence of knowledge, information and belief, and basing their answer on that ground deny, generally and specifically, each and every allegation therein contained and demand that strict proof thereof be made by the petitioner; except, however, they admit that petitioner on July 22, 1936, filed in the above entitled court a verified application; that said court on July 22, 1936, purported to
3498 appoint petitioner as conservator of the old company; that on August 11, 1936, said court purported to ratify, approve and confirm said order and appointment, purported to adopt the same, and purported to reappoint petitioner as conservator, and that said petitioner took possession of the assets of the old company and carried on and conducted the business and affairs of the old company.

3499 X.

Answering paragraph VII of said petition, allege that they do not have knowledge, information or belief sufficient to enable them or either of them to answer the allegations therein contained, and because of such absence of knowledge, information and belief, and basing their answer on that ground deny, generally and specifically, each and every allegation therein con-
3500 tained and demand that strict proof thereof be made by the petitioner; except, however, they admit the corporate organization of the new company, the transfer thereto of the sum alleged, the transfer thereto of certain assets of the old company, that the petitioner has carried on and conducted the business and affairs of the old company, that petitioner applied for a certain court order, and that the above entitled court
3501 purported to make said order on August 17, 1936.

XI.

Answering paragraph VIII of said petition, allege that they do not have knowledge, information or belief sufficient to enable them or either of them to answer the allegations therein contained, and because of such absence of knowledge, information and belief, and basing their

3502 answer on that ground deny, generally and specifically, each and every allegation therein contained and demand that strict proof thereof be made by the petitioner; except, however, they admit the petitioner has invited the presentation of plans and offers and that petitioner submits a proposed agreement and asks approval thereof.

Wherefore, these answering and objecting interveners pray as follows, to-wit:

3503 (1) That said petition be wholly denied;

(2) That the revised rehabilitation and reinsurance agreement, as proposed by the petitioner, be wholly denied and disapproved;

(3) That no rehabilitation and reinsurance agreement be entertained or approved by the court until and unless the same shall serve to fully protect and preserve the contractual and constitutional rights of holders of non-cancellable 3504 income policies, and until and unless the same shall make no descrimination whatsoever against this class of policy holders in favor of any other class of policy holders or creditors;

(4) That no rehabilitation and reinsurance agreement be entertained or approved by the court until and unless the same shall contain an alternate schedule whereby the holders of non-

cancellable income policies may elect to receive the full original monthly benefits provided in their respective policies by paying a reasonably higher premium, in lieu of paying the originally established premiums and securing only a percentage of the original monthly benefit; and until and unless the same shall provide that all sums in excess of the originally established premium rates, which shall be paid by non-cancellable income policy holders pursuant to such alternate schedule, shall be deposited in a special fund, and that such excess payments shall be refunded to the respective payors at the earliest date on which net profits derived by the carrier from its entire business operations shall make such refunding possible;

(5) That each of these answering interveners have and recover his respective costs herein against the petitioner; and

(6) For such other and further relief as to the court may seem meet and proper in the premises.

W. B. ETHERIDGE,

Attorney for Interveners, Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans.

Verified.

In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. Pacific Mutual Life Insurance Company, a corporation, intervener. Dr. Arthur B. Allen, Dr. Carl H. Parker, Lloyd W. Brooke and I. Blair Evans, interveners. No. 404673.

Affidavit of Mailing.

State of California, County of Los Angeles—ss.

Alice M. Leupp, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 712 First Trust Building, Pasadena, California; that on the 16th day of October, 1936, affiant served the within joint answer and objections of interveners, etc., on the petitioner in said action by placing a true copy thereof in an envelope addressed to one of the attorneys of record for said petitioner at the office address of said attorney, as follows:

"U. S. Webb, Attorney General, State Building, Los Angeles, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Pasadena, California, where is located the office of the attorney for the persons by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

ALICE M. LEUPP.

Subscribed and sworn to before me this 16th day of October, 1936.

(Seal) MABEL CLAUSEN,
Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed Oct. 17, 1936, 10:19 a. m. L. E. Lampton, county clerk; by M. Zimmerman, deputy.

3514 [TITLE OF COURT AND CAUSE.]

Proposal.

To the Honorable, the Superior Court of the State of California, in and for the County of Los Angeles:

The proposal set forth on the following pages is respectfully submitted for consideration in this matter, by the Transamerica group, to-wit:

3515 PROPOSAL TO REINSURE THE BUSINESS OF THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

The plan hereinafter outlined contemplates the organization of two corporations under the laws of the state of California. Said companies will be appropriately named, each will be under separate and independent management, and will be referred to herein as the "Life Company" and
3516 the "Accident Company". The Transamerica group, of which the Occidental Life Insurance Company is a part, will pay to said corporations an aggregate of $12,108,200.00. The Accident Company will receive a portion of the profits of the Life Company.

The Pacific Mutual Life Insurance Company of California will be hereinafter designated as "Pacific Mutual". Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California,

as Conservator of The Pacific Mutual Life Insurance Company of California, will be hereinafter referred to as "Conservator". The Superior Court of the State of California in and for the County of Los Angeles will be hereinafter referred to as "The Court". Non-cancellable Income Policies will be hereinafter referred to as "Non-Can policies". The term "Commissioner" shall mean the present Insurance Commissioner of the State of California or his successor in office.

The Life Company

1. The Life Company shall have a capital of $1,000,000, together with a surplus of $2,000,000, said amounts, aggregating $3,000,000, to be paid into the company by the Transamerica group.

2. The Life Company will reinsure and assume the liabilities of the Pacific Mutual under all policies and contracts of insurance, except Non-Can policies, issued or assumed by the Pacific Mutual and outstanding and in force on July 22, 1936, or issued by the Conservator, subject, however, to any and all offsets, rights and defenses then or thereafter existing against said policies or contracts of insurance which would have been available to the Pacific Mutual or the Conservator. Liabilities under Non-Can policies are expressly excluded from the obligations assumed by the Life Company.

3520 3. (a) The Life Company will agree to reinsure and assume, upon the terms and conditions hereinafter set forth, all policies other than Non-Can policies, which have lapsed, upon the reinstatement thereof in accordance with the terms and conditions of each such policy.

(b) The foregoing paragraph (a) is modified to the extent that any policy, other than a Non-Can policy, lapsed since July 22, 1936, will be reinstated during the lifetime of the insured,
3521 provided the insured is not in such condition as to be eligible for benefits under his policy, without evidence of insurability, on written application therefor by the insured and payment of all premiums in arrears, if such application is made and premiums are paid within seventy-five (75) days after the approval by the Court of the reinsurance agreement contemplated by this proposal.

(c) Upon the reinstatement of a lapsed policy
3522 it shall for all purposes be treated (but only from and after the date of reinstatement) the same as if it had been in force on the effective date of the reinsurance agreement contemplated herein, and shall be subject to the terms and conditions of said agreement.

4. The Life Company will pay in full all valid unpaid claims under policies issued or assumed by the Pacific Mutual, other than Non-Can policies, and all claims arising under the

policies reinsured by it, and all liabilities which are incident to such policies, subject, however, to any and all defenses, offsets or counterclaims which would have been available to the Pacific Mutual or to the Conservator.

5. (a) The Conservator shall sell, assign, convey and transfer, or cause to be sold, assigned, conveyed and transferred to the Life Company, vesting title thereto in the Life Company free and clear of encumbrances, tax or other liens or adverse claims, Pacific Mutual assets equal in value to the aggregate sum of the legal reserves required for the policies and contracts reinsured by the Life Company and such other liabilities assumed by the Life Company in its reinsurance agreement.

(b) All of the Pacific Mutual assets to be acquired by the Life Company, as hereinabove set forth, shall be taken at values to be determined and fixed by mutual agreement between the Conservator and the Transamerica group. Any assets upon the value of which the Conservator and said Transamerica group cannot agree, shall be valued by a board of three appraisers, two of whom shall be appointed by the Court and the third by the Transamerica group. Assets to be transferred and set over to the Life Company shall be selected by the Conservator and approved by the Transamerica group, at

3526 values agreed upon as aforesaid or determined by said appraisers, as the case may be.

(c) The amount of the reserves required for the business reinsured and the value of the assets to be acquired by the Life Company shall be fixed and determined as of the effective date of the contemplated reinsurance agreement.

(d) On the assumption that the amount of the required reserves and the value of assets will be approximately the same on the effective date
3527 of the proposed reinsurance agreement as the asset values and reserves set forth in the Convention Examination Report as of December 31, 1935, the attached schedules, designated Schedule A and Schedule A-1, will reflect the approximate amount of assets to be acquired, the approximate amount of required reserves, the approximate amount of liabilities to be assumed, and the capital structure of the Life Company.

6. The Life Company will engage in a gen-
3528 eral life, accident and health insurance business and will segregate its business by establishing three departments, namely: (1) Participating Life Insurance Department; (2) Non-participating Life Insurance Department; and (3) General Accident and Health Insurance Department. To each department will be allocated a portion of the Pacific Mutual assets acquired by the Life Company equal in value to the amount of reserves and liabilities of such department. The selection

3529 of assets allocated to each department shall be made by the Conservator and approved by the Transamerica group.

7. The Life Company will assume no claims or liabilities of any kind or nature against the Pacific Mutual or the Conservator other than those hereinabove set forth. The Life Company will pay to the Conservator such amount of money, if any, hereafter paid by the Conservator in satisfaction of claims filed by dissenting hold-
3530 ers of policies reinsured under the terms of this proposal and allowed by the Court. There shall be no moratorium on policy loans or surrenders for cash value.

8. Representation on the Board of Directors of the Life Company will be offered to interested groups of policy holders and agents; and in the conduct of its business the Life Company will retain all satisfactory employees of the Pacific Mutual.

3531 9. The Life Company will enter into equitable agency agreements with such agents of the Pacific Mutual as desire to become associated with the Life Company, and so long as any such agent remains in the service of the Life Company, renewal commissions will be paid such agent on policies written by him for the Pacific Mutual and reinsured by the Life Company, in accordance with the terms and provisions of his Pacific Mutual agency contract covering such

3532 business. In computing commissions under Pacific Mutual agency contracts policies reinsured by the Life Company shall be considered a continuation of existing policies and not the writing of new business.

10. The Life Company will pay to the Accident Company fifty per cent (50%) of the net profits of the business of its Accident Department, payments to be made in annual installments, subject to the terms and conditions and
3533 termination of such payments, as hereinafter set forth.

The Accident Company

11. The capital stock of the Accident Company will consist of 254,100 shares of Class A common stock and 254,100 shares of Class B common stock. All of said stock shall be of the par value of $1.00 per share and shall have the same voting and dividend rights. The Transamerica group will pay $508,200 for said stock,
3534 totaling 508,200 shares, and will deliver all of the Class A stock to the stockholders of the Pacific Mutual on terms and conditions to be set forth in the contemplated reinsurance agreement. Class A common stock shall be callable at any time within ten (10) years at $30 per share. In the event of liquidation of the Accident Company after restoration of full benefits and agents' commissions, Class A stock shall participate in the distribution of assets to the extent of $10 per share, after which the Class B stock shall

3535 participate in such distribution of assets to the extent of $10 per share, and thereafter both classes of stock shall participate equally in any distribution of assets.

12. In addition to the payment of $508,200 as set forth in the preceding paragraph, the Transamerica group will pay to the Accident Company $1,100,000 and will make further payments to the Accident Company of a sum not exceeding $7,500,000, at the rate of $500,000 per
3536 year, subject to the terms and conditions hereinafter set forth.

13. (a) The Accident Company will assume and reinsure liabilities of the Pacific Mutual and the Conservator under all Non-Can Accident and Health policies issued by the Pacific Mutual and in force on the effective date of the agreement contemplated by this proposal, subject to the policy terms and conditions and also to the terms, conditions and limitations; and only
3537 to the extent, hereinafter specifically provided, and subject also to any and all claims, defenses, actions and rights in connection therewith, which would have been available to the Pacific Mutual or the Conservator.

(b) The Accident Company will pay, without deduction, every valid claim for disability benefits under any such policy for disability arising prior to July 22, 1936, with respect to which claim or notice of claim was duly filed in accordance with the terms of the policy on or before

3538 August 12, 1936, and will likewise pay all liabilities, without deduction, under settlement agreements made by the Pacific Mutual with claimant under any such policy. All such claims are subject, however, to all defenses and rights which would have been available to the Pacific Mutual or to the Conservator.

(c) As to all other claims for disability benefits under Non-Can policies, now pending or hereafter arising, the Accident Company's liability in any such case shall be limited to the percentages of the monthly disability benefits set forth in the following schedule:

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Prem. Class	Issued Under Rate Books	Policy Forms	Issued Under Policy Nos.	Percentage of Original Monthly Benefit Assumed New Company
1918	A1445-A1445Z A1445Y-A1445X A1445W	A231 to A288, inc.	2658601 to 2698150 ~~4600501 to 4628000~~ 4711101 to 4712600 4730901 to 4731100	50%
1921	A1687-A1687Z A1687Y-A1687X A1687W	A291 to A294, inc. A365-A366	4628001 to 4700000	59%
1926	A1958-A1958Z	A382-A383 A386-A387 A387Z	5500001 to 5600000	65%
1929	A2293	A382-A383 A386-A387 A387Z	5600001 to 5620000	72%
1931	A2367	A753 to A756, inc. A763-A764	5620001 to 5635000	78%
1932	A2432-A2432Z A2499	A775 to A780 inc.	5635001 to 6000000	93%
	A2499	Aggregate A1216 to A1221, inc.	6500001 to 7000000	93%
1935	A2567	Aggregate A1226 to A1229, inc.	7000001 to 7100000	93%

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3541 Benefits under all such policies shall be reduced to the extent indicated in the foregoing schedule but shall be subject to restoration of monthly benefits as hereinafter provided.

(d) Notwithstanding the reduction in benefits and the limitation of the obligation of the Accident Company to make monthly disability payments, as set forth in the preceding paragraph, each holder of any such policy, to be entitled to the benefit of the proposed reinsurance agree-
3542 ment, shall be obligated to continue payment of premiums in the amount stipulated in his policy.

14. (a) At the end of five (5) years from the effective date of the contemplated reinsurance agreement, or at such earlier date as may be fixed by the Commissioner, the reserve requirements shall be recomputed and if reserves and funds available for reserves are then sufficient to justify an increase in the schedule of
3543 benefits set forth in paragraph 13(c) hereof, benefit payments on claims then in force at reduced rates and benefits on future claims will be increased to a rate approved by the Commissioner. Thereafter, redetermination of reserve requirements and available reserves for the purpose of adjusting benefit rates shall be made from time to time upon request of the Accident Company or the Commissioner, to the end that full benefit payments under said policies may ultimately be restored.

(b) Surplus of the Accident Company (not including funds received from the Life Company representing a share of the net profits of its Accident and Health Department) not required for the successful conduct and operation of its business, shall be used for the purpose of restoring benefits under all policies not in benefit and increasing future payments under policies in benefit. Such available funds shall from time to time be added to the reserves for such policies until such time as adequate reserves have been established for the full restoration of such policies, at which time the Accident Company will fully assume and reinsure all such policies not in benefit, and at said time said policies not in benefit shall be deemed to be fully restored.

(c) Funds received from the Life Company, representing one-half of the net profits of its Accident and Health Department, shall be used exclusively for the purpose of making up deficiency in payments of disability benefits to claimants who have been paid less than they were entitled to receive under their policies as originally written.

After policies not in benefit shall have been fully reinsured and a surplus of $2,500,000 shall have been accumulated for Class A stock, all surplus funds of the Accident Company not required for the successful conduct and operation of its business, shall be used for the purpose of making

3547 up deficiency in payments of disability benefits to claimants who have been paid less than they were entitled to receive under their policies as originally written.

(d) The Accident Company shall not be required to pay or restore full benefits under policies as originally written, except in the manner and to the extent hereinabove set forth.

(e) The Transamerica group agrees to make certain payments to the Accident Company for 3548 a period of fifteen (15) years, as set forth in paragraph 12 hereof. Whenever, prior to the expiration of said fifteen year period, full restoration of benefits, not including deficiencies in benefit installments previously paid, shall have been made and there has been full restoration of commissions to agents, and the Accident Company shall have accumulated a surplus of $2,500,000 for its Class A stock, then upon the 3549 happening of those events, the Transamerica group will be released from its obligation to make any further payments. Transamerica group reserves the right to make payment at any time prior to the expiration of said fifteen year period of an amount sufficient to provide a surplus of $2,500,000 for the Class A stock after providing for full restoration of benefits, not including deficiencies in benefit installments previously paid, and agents' commissions, and upon the making of such payment Transamerica group will be re-

3550 leased from its obligation to make any further payments.

Upon full restoration of benefits, payment of deficiencies in benefit installments previously paid and restoration of commissions to agents, the Life Company will be released from its obligation to pay to the Accident Company a portion of the net profits of the Accident and Health Department.

3551 No dividends shall be paid to stockholders of the Accident Company until after full restoration of benefits, payment of deficiencies in benefit installments previously paid and restoration of commissions to agents.

(f) The basis to be used in determining the adequacy of reserves shall be the New York Standard Table, with the variable factor limited

3552 to the actual experience of the Pacific Mutual and/or the Accident Company with Non-Can Accident and Health insurance, or such other table or basis as shall be required by the laws of the state of California.

15. All of the Pacific Mutual assets not transferred and delivered to the Life Company, and the proceeds of any claim, right or cause of action collected by the Conservator, shall be trans-

ferred, assigned and conveyed to the Accident Company.

16. On the assumption that the value of the assets and the required reserves will be approximately the same on the effective date of the proposed reinsurance agreement as the asset values and reserves set forth in the Convention Examination Report as of December 31, 1935, the attached schedules, designated Schedule A and Schedule B, indicate the approximate amount of assets to be taken over by the Accident Company, the approximate amount of required reserves, the approximate amount of liabilities to be assumed and reinsured by the Accident Company, and the capital structure of the Accident Company. The proposal to pay benefits, on claims arising subsequent to July 22, 1936, according to the schedule of reduced benefits hereinabove set forth, is based upon the figures and statistics contained in the Convention Examination Report of the business and condition of the Pacific Mutual as of December 31, 1935, and shall be subject to examination, verification, adjustment and extension of the data contained in said report, to the effective date of the agreement contemplated by this proposal.

3556 17. Representation on the Board of Directors of the Accident Company will be offered to interested groups of policy holders and agents; and in the conduct of its business the Accident Company will retain all satisfactory employees of the Pacific Mutual.

18. The Accident Company shall have the right to engage in a general accident and health insurance business.

3557 19. The Accident Company will enter into equitable agreements with such agents of the Pacific Mutual as desire to become associated with the Accident Company, and so long as any such agent remains in the service of the Accident Company, renewal commissions will be paid such agent on policies written by him for the Pacific Mutual and reinsured by the Accident Company,

3558 in accordance with the terms and provisions of his Pacific Mutual agency contract covering such business, as herein modified. This proposal contemplates the temporary payment of disability benefits under the Non-Can Policies on a reduced basis. It is believed that agents are interested in the restoration of full benefit payments under Non-Can policies at the earliest practicable date and, to that end, are willing to cooperate with proponent by deferring payment of a part of

their commissions which would otherwise be payable to them. It is proposed that commissions payable to agents on Non-Can policies shall be adjusted by a reduction thereof corresponding to the percentage of reduction of benefit payments in effect for each class of policies as shown in the schedule hereinabove set forth. As the rate of benefit payments under policies is increased, commissions to agents will at the same time be correspondingly increased.

20. The Accident Company will agree to pay the Conservator a sum equal to all legal and valid claims filed with the Conservator and allowed by the Court, except valid claims of any character which may be allowed by the Court and paid by the Conservator prior to the transfer and delivery of Pacific Mutual assets to the Accident Company. In the event that claims of any kind not specifically assumed by the Life Company and not arising out of the business transacted by said Company on its own account, shall be asserted against the Life Company and the Life Company shall be required by the final judgment of any court of competent jurisdiction to pay or discharge such claims, or in case the Life Company is made a party defendant in any suit or suits arising out of the pending proceed-

3562 ings, the Accident Company shall reimburse the Life Company for all amounts so determined and paid and also its reasonable costs and expenses incurred in connection with any such litigation.

The foregoing sets forth the essential features of the plan of the Transamerica group for the reinsurance of the business of the Pacific Mutual. If this proposal is accepted, appropriate agreements will be prepared and executed which will clearly and definitely express the intentions and
3563 the obligations of the parties thereto. In addition to the matters outlined in this proposal such agreements will contain such other provisions as may be mutually agreed upon by the Conservator and the Transamerica group, including such provisions as are usually contained in reinsurance agreements.

If, in the opinion of the Conservator and the Court, the proposal hereinabove outlined can be modified so as to facilitate and make more effec-
3564 tive its purposes the Transamerica group will give careful and sympathetic consideration to any suggestions for the improvement of its general plan, to the end that all interested persons, and particularly policy holders in all groups, may be accorded treatment that is as fair, just and equitable as it is possible to secure under all the circumstances.

Dated at Los Angeles, California, October 17, 1936.

L. M. GIANNINI

3565 Schedule A

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

Schedule of Net Assets, Liabilities and Surplus or Deficit for Life, General Accident and Health (exclusive of non-can), and non-cancellable Accident & Health Departments

Constructed from Convention Examination Report—December 31, 1935

	Life	Accident & Health	Non-Can	Total
3566 Net Assets	$187,893,222.60		$27,023,979.50	$214,917,202.10
Net Reserves:				
For Policies & Ann.	154,989,200.00			154,989,200.00
Unearned Prem.		$1,107,357.25	1,796,570.87	2,903.928.12
Non-can policies			24,685,977.00	24,685,977.00
Losses & Claims	1,343,558.00	690,178.00	19,643,031.00	21,676,767.00
Disability	10,120,656.00			10,120,656.00
Sup. Contracts	5,718,710.00			5,718,710.00
Est. Claim Exp. 3567 Liab.		38,858.00	824,481.00	863,339.00
Com. Payable		104,400.00	35,626.00	140,026.00
Asset Val. Reserves	2,103,349.94	440,000.00		2,543,349.94
Taxes Accrued	570,560.52	204,223.27		774,783.79
Other Liab.	7,331,992.14	224,647.81		7,556,639.95
Total Liabilities and Reserves	182,178,026.60	2,809,664.33	46,985,685.87	231,973,376.80
Surplus or Deficit	5,715,196.00	2,809,664.33	19,961.706.37	17,056,174.70

3568	Surplus Assets in Life Dept. to be transferred to Acc. & Health & Non-can Departments	5,715,196.00	2,809,664.33	2,905,531.67	
	Deficit			17,056,174.70	17,056,174.70
3569	Assets for Each Dept. after transferring Life Dept. surplus Assets to Acc. Dept.	182,178,026.60	2,809,664.33	29,929,511.17	214,917,202.10

Schedule A-1

NEW LIFE COMPANY
OPENING FINANCIAL STATEMENT ASSUMING ASSETS AND RESERVES CORRESPONDING IN AMOUNT WITH AMOUNTS CONTAINED IN SCHEDULE A

ASSETS

	Cash Paid in by Transamerica Group	$ 3,000,000.00
3570	Net Assets—Life Dept.	182,178,026.60
	Net Assets—Acc. & Health Dept.	2,809,664.33
	Total Assets	$187,987,690.93

LIABILITIES, RESERVES AND CAPITAL

Total Liabilities and Reserves	184,987,690.93
Capital Stock	1,000,000.00
Paid-in Surplus	2,000,000.00
Total Liabilities, Reserves and Capital	$187,987,690.93

3571 Schedule B

ACCIDENT COMPANY OPENING FINANCIAL STATEMENT ASSUMING ASSETS CORRESPONDING IN AMOUNTS WITH AMOUNTS CONTAINED IN SCHEDULE A, AND USING RESERVES REQUIRED TO MAINTAIN BENEFIT PAYMENTS ON NON-CANCELLABLE POLICIES AT THE RATES SET FORTH IN PARAGRAPH 13(c) OF THE FOREGOING PROPOSAL.

ASSETS

Cash paid in by Transamerica Group under foregoing proposal	$ 1,608,200.00
*Deferred Receivables	7,500,000.00
Other Net Assets	29,929,511.17
3572 Total Assets	$39,037,711.17

LIABILITIES, RESERVES AND CAPITAL

Liabilities		$ 860,107.00
Reserves:		
Required to provide benefits set forth in Paragraph 13(c) of foregoing proposal	$10,525,000.00	
Required for Losses and Claims in force	19,643,031.00	30,168,031.00
Total Liabilities & Reserves		$31,028,138.00
Capital Stock		
Class A Common—254,100 sh. par value $1		
Class B Common—254,100 sh. par value $1		509,573.17
3573 *Deferred Surplus		7,500,000.00
Total Liabilities, Reserves & Capital		$39,037,711.17

*The deferred surplus represents the future payments of $500,000 per year to be paid by the Transamerica group in accordance with the terms of the foregoing proposal. In addition, there is a future deferred surplus not reflected in the above statement, consisting of 50% of the profits of the Accident and Health Department of the Life Company payable in accordance with the terms of the foregoing proposal.

Proposal by Transamerica group via Giannini.

Filed Oct. 17, 1936, 11:55 a. m. L. E. Lampton, county clerk; by J. C. Gordon, deputy.

3574 [TITLE OF COURT AND CAUSE.]

Appearance and Objections to Petition for Approval of Rehabilitation and Reinsurance Agreement.

Pursuant to the petition for approval of rehabilitation and reinsurance agreement of Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, and in response to the order to show cause with respect thereto and on
3575 file herein, the undersigned, appearing on his own behalf, alleges:

I.

That the undersigned is the owner and holder of The Pacific Mutual Life Insurance Company of California Non-Cancellable Income Policy No. 4642998, form A 292, issued under date of October 30, 1923, providing for the payment to the undersigned, under the terms and conditions in said policy set forth, of the sum of two hundred
3576 dollars ($200.00) per month. That said policy has been by the undersigned maintained in continuous force and effect since the date of issuance thereof, by and upon the payment of annual premiums as they have respectively matured, and said policy is now in force and effect and all premiums thereon have been so paid so as to render such policy a subsisting contract until October 30, 1937. That the undersigned has not become disabled within the meaning of said policy, and has received no disability benefits thereunder.

3577 II.

The undersigned does hereby object to the plan of the Insurance Commissioner of the State of California as embodied in said "Rehabilitation and Reinsurance Agreement" dated as of July 22, 1936, as amended, upon grounds, among others, as follows:

1. That the Commissioner seeks approval of this court for the organization by him of a new life insurance company having a name substan-
3578 tially similar to the name of the respondent herein, with a capital of $3,000,000 paid in from the assets of the respondent, the old company, whereas one or more new companies could have been, and can be organized, for the purpose of reinsuring and carrying on all phases of the respondent's business under a plan calling for the contribution of new capital to such departments of said business as may be in need thereof, and without charging such capital contribution against the
3579 assets of the respondent. In the judgment of the undersigned it is necessary for the protection of all policy holders of respondent, particularly the holders of non-cancellable income policies, that such new company or companies be organized to assume the liabilities of the respondent and carry on the business thereof with a new and different management, and with a corporate name or names totally different and distinct from that of the respondent as a means of overcoming sales and other resistance arising from the difficulties

3580 in which respondent finds itself. In the judgment of the undersigned the difficulties involving the respondent have utterly destroyed and rendered valueless its good will.

2. The undersigned furthermore objects to that part of the Commissioner's plan which calls for a moratorium upon cash surrender values and policy loans, and states that the organization of one or more new companies to take over all phases of respondent's business, with a contribu-
3581 tion of new and additional capital under new management, will render a moratorium on policy loans and cash surrender values unnecessary. The undersigned states he is the owner of one or more policies of life insurance issued by the respondent, all of which policies are in good standing.

3. The plan of the Commissioner with respect to the Pacific Mutual Life Insurance Company (the New Company) reinsuring and assuming
3582 the liabilities of the respondent, the Old Company, under all non-cancellable policies, is arbitrary, capricious, unfair and discriminatory to the holders of such policies. The undersigned furthermore states that under a plan calling for the organization of a new company, with new and additional capital and under new management, the liability of the respondent under its non-cancellable income policies can be reinsured to far greater benefit and advantage to the hold-

ers of non-cancellable policies than under the plan of the Commissioner, which makes no provision for the contribution of new capital to the New Company or any other proposed organization.

Wherefore, the undersigned, as the holder of one or more policies issued by the respondent, prays that the plan of said Insurance Commissioner as embodied in the "Rehabilitation and Reinsurance Agreement," dated as of July 22, 1936, as amended, and as annexed as Exhibit A to the Commissioner's petition for approval of rehabilitation and reinsurance agreement be disapproved, and that consideration be given by this court to such plan or plans as may be presented for the reinsurance of the liabilities of the respondent by the organization of one or more companies under new and different management, under new corporate names and by and with the contribution of new and additional capital.

HERBERT FRESTON,
(Herbert Freston)
In Propria Persona.

Verified.

Endorsed: Received copy of the within appearance & objections this 19 day of Oct., 1936. U. S. Webb, attorney general; John L. Flynn, deputy, attorneys for petitioner.

Filed Oct. 19, 1936, 9:31 a. m. L. E. Lampton, county clerk; by J. C. Gordon, deputy.

3586 [TITLE OF COURT AND CAUSE.]

Appearance and Answer of Respondents Hereinafter Named, to the Petition and Order to Show Cause Heretofore Issued by the Above Entitled Court.

Come now the respondents hereinafter named, on behalf of each of them and on behalf of all other holders of non-cancellable income accident and health policies of the Pacific Mutual Life
3587 Insurance Company of California, a corporation, and oppose and object to the above entitled court making all or any of the orders referred to and described in that certain order to show cause with respect to rehabilitation and reinsurance of the Pacific Mutual Life Insurance Company of California, a corporation, issued on the 25th day of September, 1936, by Honorable Henry M. Willis, judge of the above entitled court:

I.

3588 That heretofore, to-wit, on the 20th day of August, 1936, there appeared in the above entitled action respondents G. C. Parsons, J. A. Marvin and G. R. Snider, as owners and holders of non-cancellable income policies of the Pacific Mutual Life Insurance Company of California, a corporation, hereinafter referred to as Pacific Mutual Company, and as members of and as a protective committee for holders of non-cancellable income policies of said Pacific Mutual Com-

3589 pany; that said respondents have appeared through their counsel at every subsequent hearing of said matter before said court, and at all hearings and meetings of the conference committee appointed and/or approved by the above entitled court for the purpose of working out a plan of reorganization and rehabilitation of said Pacific Mutual Company.

II.

3590 That said respondents above named, as individuals and as members of said committee, and as said committee, now make answer to and state their objections to the said order to show cause above named.

III.

That the following respondents, all of whom have joined with a large number of other persons similarly situated, whose names are too
3591 numerous to be mentioned and set forth herein, as members of said protective committee for holders of non-cancellable income policies of the said Pacific Mutual Company, also state their protest and objections to the granting or making of said orders and matters referred to in said order to show cause issued on the said 25th day of September, 1936. That the names and addresses and the policy numbers of said respondents are as follows:

	Name	Address	Policy Number
3592	F M. Lillie,	369 Lexington Ave., New York, N. Y.	4644539
	J. H. Carlson,	116 John St., New York, N. Y.	5500045
	Clarence F. Corner,	c/o Andrew J. Kellock, 15 East 49 St., New York, N. Y.	5606147
3593	J. Forgione,	c/o Andrew J. Kellock, 15 East 49 St., New York, N. Y.	4659881
	H. M. Goldblatt,	30 Rockefeller Plaza, New York, N. Y.	4628477
	G. E. Reinbrecht,	c/o D. H. Ward, 225 Bway., New York, N. Y.	5600245
	G. D. Strayer,	c/o D. H. Ward, 225 Bway., New York, N. Y.	2658687
3594	A. S. Wing,	c/o D. H. Ward, 225 Bway., New York, N. Y.	4612491
	C. E. Muchmore,	60 East 42 St., New York, N. Y.	4628397
	J. H. Grover,	St. Louis Union Trust Co., St. Louis, Mo.	4616433
	Charles Selig,	100 East 42 St., New York, N. Y.	5500144
	J. M. Gambrill,	Columbia University, New York, N. Y.	2668721

3595 E. H. Dendel, 16 Columbia Terrace, Weehawken, N. J. 2659194

W. J. Hallowell, Drawer 960, Manchester, New Hampshire 5613137

D. K. Rose, 150 Nassau St., New York, N. Y. 5611646

Oscar Brown, 30 Rockefeller Plaza 5627704

W. W. Kistler, MD, 142 Hanover St., Wilkes-Barre, Pa.

3596 L. W. Sloan, MD, Presbyterian Medical Center, New York, N. Y. 5635071

R. A. Hurd, MD, 210 East 68 St., New York, N. Y. 4628702

A. R. Penfield, Waldorf Paper Prods. Co., St. Paul, Minn. 4641053

Beaven, Jos. C., 88 Lexington Ave., New York, N. Y. 5625565

3597 Gray, C. H. G., 463 West St., New York, N. Y. 5500332

Gruger, F. R., 124 E. 28th St., New York, N. Y. 5606248

Keating, W. L., 80 Broad St., New York, N. Y. 5625565

Lincoln, S. B., 30 Rockefeller Pl., New York, N. Y. 5620416

Marvin, J. A., 100 Broadway, New York, N. Y.

3598 Needham, W. R., 500 Fifth Ave., New York, N. Y. 5507229

Parsons, G. C., 225 Broadway, New York, N. Y. 5521506

Perry, Glen H., 280 Broadway, New York, N. Y. 5515588

Pittman, E. W., 75 Varick St., New York, N. Y. 5613536

Pratt, F. M., 8 East 13th St.,
3599 New York, N. Y. 5507110

Rankin, R. S., 195 Broadway, New York, N. Y. 5507277–8

Snider, G. R., 55 Cedar St., New York, N. Y. 5620470–1

Summers, D. G., 304 Ridgewood Rd., South Orange, N. J. 5600474

Yuill, A. J., 60 Broad St., New York, N. Y. 5500268

3600 Bull, Wellington, 120 Broadway

Bowman, Harold S., 122 E. 42 St., New York, N. Y. 4623782

Bush, W. P. D., American Ins. Co., Greensboro, N. C. 4656778

Martin, B. R., 400 E. Genesee St., Syracuse, N. Y. 4621869

Haines, E. F., 124 St. James Ave., Merchantville, N. J. 4612871

3601 Farrow, E. S., 230 Cobbs Hill Drive, Rochester, N. Y. 4662150

Jordan, F. F., 400 Madison Ave., New York, N. Y.

Brown, Arthur L., 1 Broadway, New York, N. Y. 4648495

Rodriguez, Arthur, 701 First Ave., New York, N. Y. 4659996

Crampton, Dr. C. W., 515 Park
3602 Ave., New York, N. Y.

Baehr, George, 110 East 80 St., New York, N. Y. 4625408

Rothenburg, L. M., 1397 Union St., Brooklyn, N. Y. 4637916

Brown, L. Howland, 71 Broadway, New York, N. Y. 2669118

Block, J. Horace, 50 Broadway, New York, N. Y. 4618665

3603 Lee, Paul P., 120 Broadway, New York, N. Y. 4650244–5–6
4650232

Matteson, L. J., 99 John St., New York, N. Y. 4628221

Herstein, Karl M., 18 East 41 St., New York, N. Y. 5515750

Lohse, Willis R., c/o C. Missall, 155 East 42 St., New York, N. Y. 6501060

3604 Crawford, Walter F., 32 Sixth Ave., New York, N. Y. 5521518

Updike, Harold W., 3429-80 St., Jackson Heights, N. Y. 5606294

Kay, C. Rob't., 25 Prospect Place, New York, N. Y. 5625116

Lyon, Chas. C., 185 Market St., Newark, N. J.

Poole, Arthur Bensell, 30 Rockefeller Plaza, New York, N. Y. 5508057-8

3605 Kohberger, Dr. H. P., 118 S. Negley Ave., Pittsburgh, Pa.

Donahue, John M., 123 Wilshire Rd., Brighton, N. Y.

Kelley, F. M., 641 Onondaga County Savings Bank Bldg., Syracuse, N. Y. 4657383

Apple, John F., Jr., 60 Beaver St., New York, N. Y. 5500366

3606 Berman, Hyman, 16 Court Street, Brooklyn, N. Y. 5521653

Sloan, E. D., P. O. Box 954, Greenville, S. C. 4641405

Hotaling, Elmer E., 527 Fifth Ave., New York, N. Y. 4628769

Ryer, Elmer LeRoy, 527 Fifth Ave., New York, N. Y. 4628096

Connor, Jerome N., 40 West 40 St., New York, N. Y. 5606314

3607 Updegraff, Robt. R., Harwood Bldg., Scarsdale, N. Y. 4603325

Landis, Dr. Carney, 722 West 168 St., New York, N. Y. 5500253

Pickering, Harold G., 20 Pine Street, New York, N. Y. 4643474

Frazer, Marc, 420 Lexington Ave., New York, N. Y. 4641381

Eberhardt, John B., c/o Jones & Jones, 50 Church St., New York,
3608 N. Y. 4628219

Parsons, Bruce, 111 W. Washington St., Chicago, Ill. 5517278

Colville, Ralph E., Montgomery Ward, Chicago, Illinois 381135

Schumaker, S. O., 417 Second Natl. Bldg., Akron, Ohio

Smith, H. L., Payne Shoemaker Bldg., Harrisburg, Pa.

3609 Porter, J. R., 214 Walton Bldg., Atlanta, Ga. 5615052

Frey, C. J., Erie Trust Bldg., Erie, Pa. 5506517–8

McDaniel, H. C. Waldorf Paper Prods., St. Paul, Miss. 4618804

Tompkins, H. D., 1790 Broadway, New York, N. Y. 5606401

Kaplan, J. G., 225 Broadway, New York, N. Y. 5620304

3610 Count, Jerome, 285 Madison Ave., New York, N. Y. 5600398

Zane, Edward R., Piedmont Bldg., Greensboro, N. C. 4662993–4

Bickelhaupt, L. J., 360 Broadway, Saratoga Springs, N. Y. 5502868

Fern, Fred S., Graybar Bldg., New York, N. Y. 5500001

Hamlin, Clay W., 17 Court St., Buffalo, N. Y. 4647693

3611 Gassaway, F. G., Wilmington, Delaware 4625730

Nottingham, W. S., Indemnity Ins. Co. of North America, Rochester, New York 5600413

Scribner, Chas. E., 20 Exchange Place, New York, N. Y. 4621807

Lamb, Karl B., Tenafly, New Jersey 4659823–4

3612 4612480

Atchley, Dana W., Box 266, Newburyport, Mass.

McMann, R. H., 12 Warren St., New York, N. Y. 5500153

Dr. C. R. Smathers, 110½ Buffalo Street, Johnson City, Tennessee 4655372 5503748

Hiram W. Johnson, Jr., Mills Building, San Francisco, Cal. 5627138

3613

IV.

That the said policies termed non-cancellable accident and health, or non-cancellable income policies of said Pacific Mutual Company are substantially identical as to their terms and benefits and that the holders of said non-cancellable policies aggregate approximately forty-nine thousand, and that they are all of one class with substantially identical interests and are too numerous to be named herein, or to join in-
3614 dividually in objecting to the making of the said orders designated and enumerated in said order to show cause above referred to and that these respondents appear for and on behalf of themselves individually and on behalf of the other policyholders holding non-cancellable accident and health or non-cancellable income policies of said Pacific Mutual Company, and ask that any relief granted herein shall be for the benefit of all of said class.

3615

V.

Respondents hereto annex a plan of reorganization and rehabilitation of the Pacific Mutual Company, proposed and offered by what is termed the Transamerica group, said proposal and offer being made by said Transamerica group by and through L. M. Giannini, and marked Exhibit "A"; respondents hereto annex and make a part of this pleading the said proposal and

offer of said Transamerica group, as if the said proposal and offer were herein set forth in detail.

VI.

Respondents, in their personal, individual and representative capacity, and representing as a class the non-cancellable policyholders, pray the court to reject the plan of reorganization and rehabilitation heretofore filed by the above named petitioner as Insurance Commissioner of the State of California, and as conservator of the Pacific Mutual Company, and to substitute and approve in its place and stead the offer and proposal of the said Transamerica group hereto annexed. Respondents respectfully urge that said offer and proposal of said Transamerica group be accepted for the following reasons:

1. That said offer and proposal will cause to be paid in excess of twelve million dollars new capital and credit, which will be of great and immediate benefit to the holders of all classes of policies of insurance in the Pacific Mutual Company, and particularly for the holders and owners of the non-cancellable accident and health or non-cancellable income policies.

2. That the proposal and offer of the said Transamerica group will more certainly and surely restore the full benefits to holders of said non-cancellable policies, and make such restoration within a shorter period of time, than that

3619 contemplated in the proposal of the conservator or any other plan before the court.

3. That the said proposal and offer of the Transamerica group will give greater financial and business stability to all classes of policies of the Pacific Mutual Company, than any plan now before the court.

4. That the immediate benefits and returns to the holders and owners of non-cancellable
3620 policies are much greater than is promised or assured by any plan now before the court.

5. That the plan and offer of said Transamerica group to form two new corporations as set forth in said Exhibit "A" gives greater assurance of future success in the securing of new insurance and operation of a new company than any plan now before the court.

6. That the future success of the said new companies depends upon public confidence; that
3621 confidence must be maintained by the present holders of all classes of policies in said Pacific Mutual Company, and that said offer and proposal will inspire existing policyholders to retain their policies and induce members of the public to enter into new and additional contracts of insurance, of all classes, in far greater numbers and amounts than in any plan now before the court.

7. That the said offer and proposal does away with the said moratorium and *permits* the

3622 participating and non-participating policyholders of the Pacific Mutual Company to the full and unrestricted benefits of their contracts of insurance.

8. That the proposal and offer of said Transamerica group by the investment of new capital as hereinabove set forth, gives the policyholders of all classes of said Pacific Mutual Company greater security, inspires more confidence and assures to the non-cancellable policy-
3623 holder more prompt restoration of benefits than any plan now before the court.

9. That said offer and proposal, without further detailing and specifying or particularizing its advantages, is equitable, financially sound, and of greater benefit to the policyholders of all classes of said Pacific Mutual Company and particularly to the holders of non-cancellable policies than any plan now before the court.

VII.

3624 Respondents further allege that in their opinion the Pacific Mutual Company and any successor to said company bearing the same name will be unable to successfully compete with other life insurance and accident and health companies transacting business in California and throughout the United States, because of the reputation said company bears with holders of life insurance and prospective purchasers thereof, for its failure to live up to and its repudia-

3625 tion of its contracts of insurance, as is evidenced by the petition herein and plan of rehabilitation and reorganization of the conservator on file in the above entitled court.

VIII.

That each and all of the above named respondents are policyholders of the said Pacific Mutual Company, and have paid their respective premiums and hold valid and binding policies of insurance in the said Pacific Mutual Company.

3626

IX.

That your respondents are opposed to any liquidation of the said Pacific Mutual Company, by insolvency or other proceedings, which will result, directly or indirectly, in the distribution of the assets of said Pacific Mutual Company among its policyholders and stockholders.

X.

Respondents pray the court to permit said re-
3627 spondents by and through their counsel, to present testimony, both written, oral and documentary, or in any other manner or form approved by said court, to establish the advantages of the said offer and proposal contained in Exhibit "A", and its points of superiority over any other plan submitted to or now before the above entitled court.

XI.

Answering paragraphs III, IV, V, VI, VII and VIII of the said petition of petitioner here-

3628 in, respondents do not possess sufficient information or belief as to the allegations contained and set forth in each of said paragraphs, and for lack of sufficient information or belief, deny each and every allegation contained in each of said paragraphs.

Wherefore, your respondents pray:

That the above entitled court approve and, by proper order of court, authorize the execution of contracts containing substantially the terms,
3629 contained in said offer and proposal as set forth in Exhibit A; and for such other and further relief as may be for the best interests of all classes of policyholders of said Pacific Mutual Company, particularly the non-cancellable policyholders, including your respondents herein, to the end that full public confidence in life insurance be restored, and the greatest benefits and returns be assured the holders of all classes of policies of said *Pacific Life* Insurance Company.

3630

CHAPMAN, SNIDER, DUKE AND LANDIS,
55 Cedar Street,
New York City, New York.

HIRAM W. JOHNSON, JR.,
Mills Building,
San Francisco, California.

FRANK P. DOHERTY,
433 South Spring Street,
Los Angeles, California.

By FRANK P. DOHERTY,
Attorneys for Respondents.

3631 EXHIBIT "A"

PROPOSAL TO REINSURE THE BUSINESS OF THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

The plan hereinafter outlined contemplates the organization of two corporations under the laws of the State of California. Said companies will be appropriately named, each will be under separate and independent management,
3632 and will be referred to herein as the "Life Company" and the "Accident Company." The Transamerica group, of which the Occidental Life Insurance Company is a part, will pay to said corporations an aggregate of $12,108,200.00. The Accident Company will receive a portion of the profits of the Life Company.

The Pacific Mutual Life Insurance Company of California will be hereinafter designated as
3633 "Pacific Mutual." Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as Conservator of The Pacific Mutual Life Insurance Company of California, will be hereinafter referred to as "Conservator." The Superior Court of the State of California in and for the County of Los Angeles will be hereinafter referred to as "The Court." Noncellable Income Policies will be hereinafter referred to as "Non-Can policies." The term

3634 "Commissioner" shall mean the present Insurance Commissioner of the State of California or his successor in office.

The Life Company

1. The Life Company shall have a capital of $1,000,000, together with a surplus of $2,000,000, said amounts, aggregating $3,000,000, to be paid into the company by the Transamerica group.

3635 2. The Life Company will reinsure and assume the liabilities of the Pacific Mutual under all policies and contracts of insurance, except Non-Can policies, issued or assumed by the Pacific Mutual and outstanding and in force on July 22, 1936, or issued by the Conservator, subject, however, to any and all offsets, rights and defenses then or thereafter existing against said policies or contracts of insurance which would have been available to the Pacific Mutual
3636 or the Conservator. Liabilities under Non-Can policies are expressly excluded from the obligations assumed by the Life Company.

3. (a) The Life Company will agree to reinsure and assume, upon the terms and conditions hereinafter set forth, all policies other than Non-Can policies, which have lapsed, upon the reinstatement thereof in accordance with the terms and conditions of each such policy.

(b) The foregoing paragraph (a) is modified to the extent that any policy, other than a

Non-Can policy, lapsed since July 22, 1936, will be reinstated during the life-time of the insured, provided the insured is not in such condition as to be eligible for benefits under his policy, without evidence of insurability, on written application therefor by the insured and payment of all premiums in arrears, if such application is made and premiums are paid within seventy-five (75) days after the approval by the Court of the reinsurance agreement contemplated by this proposal.

(c) Upon the reinstatement of a lapsed policy it shall for all purposes be treated (but only from and after the date of reinstatement) the same as if it had been in force on the effective date of the reinsurance agreement contemplated herein, and shall be subject to the terms and conditions of said agreement.

4. The Life Company will pay in full all valid unpaid claims under policies issued or assumed by the Pacific Mutual, other than Non-Can policies, and all claims arising under the policies reinsured by it, and all liabilities which are incident to such policies, subject, however, to any and all defenses, offsets or counterclaims which would have been available to the Pacific Mutual or to the Conservator.

5. (a) The Conservator shall sell, assign, convey and transfer, or cause to be sold, assigned, conveyed and transferred to the Life

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Company, vesting title thereto in the Life Company free and clear of encumbrances, tax or other liens or adverse claims, Pacific Mutual assets equal in value to the aggregate sum of the legal reserves required for the policies and contracts reinsured by the Life Company and such other liabilities assumed by the Life Company in its reinsurance agreement.

(b) All of the Pacific Mutual assets to be acquired by the Life Company, as hereinabove set forth, shall be taken at values to be determined and fixed by mutual agreement between the Conservator and the Transamerica group. Any assets upon the value of which the Conservator and said Transamerica group cannot agree, shall be valued by a board of three appraisers, two of whom shall be appointed by the Court and the third by the Transamerica group. Assets to be transferred and set over to the Life Company shall be selected by the Conservator and approved by the Transamerica group, at values agreed upon as aforesaid or determined by said appraisers, as the case may be.

(c) The amount of the reserves required for the business reinsured and the value of the assets to be acquired by the Life Company shall be fixed and determined as of the effective date of the contemplated reinsurance agreement.

(d) On the assumption that the amount of the required reserves and the value of assets will

be approximately the same on the effective date of the proposed reinsurance agreement as the asset values and reserves set forth in the Convention Examination Report as of December 31, 1935, the attached schedules, designated Schedule A and Schedule A-1, will reflect the approximate amount of assets to be acquired, the approximate amount of required reserves, the approximate amount of liabilities to be assumed, and the capital structure of the Life Company.

6. The Life Company will engage in general life, accident and health insurance business and will segregate its business by establishing three departments, namely: (1) Participating Life Insurance Department; (2) Non-participating Life Insurance Department; and (3) General Accident and Health Insurance Department. To each department will be allocated a portion of the Pacific Mutual assets acquired by the Life Company equal in value to the amount of reserves and liabilities of such department. The selection of assets allocated to each department shall be made by the Conservator and approved by the Transamerica group.

7. The Life Company will assume no claims or liabilities of any kind or nature against the Pacific Mutual or the Conservator other than those hereinabove set forth. The Life Company will pay to the Conservator such amount of money, if any, hereafter paid by the Conservator

3646 in satisfaction of claims filed by dissenting holders of policies reinsured under the terms of this proposal and allowed by the Court. There shall be no moratorium on policy loans or surrenders for cash value.

8. Representation on the Board of Directors of the Life Company will be offered to interested groups of policyholders and agents; and in the conduct of its business the Life Company will retain all satisfactory employees of the Pacific
3647 Mutual.

9. The Life Company will enter into equitable agency agreements with such agents of the Pacific Mutual as desire to become associated with the Life Company, and so long as any such agent remains in the service of the Life Company, renewal commissions will be paid such agent on policies written by him for the Pacific Mutual and reinsured by the Life Company, in accordance with the terms and provisions of his
3648 Pacific Mutual agency contract covering such business. In computing commissions under Pacific Mutual agency contracts policies reinsured by the Life Company shall be considered a continuation of existing policies and not the writing of new business.

10. The Life Company will pay to the Accident Company fifty percent (50%) of the net profits of the business of its Accident Department, payments to be made in annual install-

ments, subject to the terms and conditions and termination of such payments, as hereinafter set forth.

The Accident Company

11. The capital stock of the Accident Company will consist of 254,100 shares of Class A common stock and 254,100 shares of Class B. common stock. All of said stock shall be of the par value of $1.00 per share and shall have the same voting and dividend rights. The Transamerica group will pay $508,200 for said stock, totaling 508,200 shares, and will deliver all of the Class A stock to the stockholders of the Pacific Mutual on terms and conditions to be set forth in the contemplated reinsurance agreement. Class A common stock shall be callable at any time within ten (10) years at $30 per share. In the event of liquidation of the Accident Company after restoration of full benefits and agents' commissions, Class A stock shall participate in the distribution of assets to the extent of $10 per share, after which the Class B stock shall participate in such distribution of assets to the extent of $10 per share, and thereafter both classes of stock shall participate equally in any distribution of assets.

12. In addition to the payment of $508,200 as set forth in the preceding paragraph, the Transamerica group will pay to the Accident Company $1,100,000 and will make further pay-

ments to the Accident Company of a sum not exceeding $7,500,000, at the rate of $500,000 per year, subject to the terms and conditions hereinafter set forth.

13. (a) The Accident Company will assume and reinsure liabilities of the Pacific Mutual and the Conservator under all Non-Can Accident and Health policies issued by the Pacific Mutual and in force on the effective date of the agreement contemplated by this proposal, subject to the policy terms and conditions and also to the terms, conditions and limitations, and only to the extent, hereinafter specifically provided, and subject also to any and all claims defenses, actions and rights in connection therewith, which would have been available to the Pacific Mutual or the Conservator.

(b) The Accident Company will pay, without deduction, every valid claim for disability benefits under any such policy for disability arising prior to July 22, 1936, with respect to which claim or notice of claim was duly filed in accordance with the terms of the policy on or before August 12, 1936, and will likewise pay all liabilities, without deduction, under settlement agreements made by the Pacific Mutual with claimant under any such policy. All such claims are subject, however, to all defenses and rights which would have been available to the Pacific Mutual or to the Conservator.

(c) As to all other claims for disability benefits under Non-Can policies, now pending or hereafter arising, the Accident Company's liability in any such case shall be limited to the percentage of the monthly disability benefits set forth in the following schedule:

Prem. Class	Issued Under Rate Books	Policy Forms	Issued Under Policy Nos.	Percentage of Original Monthly Benefit Assumed New Company
1918	A1445-A1445Z A1445Y-A1445X A1445W	A231 to A286, inc.	2658601 to 2698150 4600501 to 4628000 4711101 to 4712600 4730901 to 4731100	50%
1921	A1687-A1687Z A1687Y-A1687X A1687W	A291 to A294 inc. A365 - A366	4628001 to 4700000	59%
1926	A1958-A1958Z	A382-A383 A386-A387 A387Z	5500001 to 5600000	65%
1929	A2293	A382-A383 A386-A387 A387Z	5600001 to 5620000	72%
1931	A2367	A753 to A756, inc. A763 - A764	5620001 to 5635000	78%
1932	A2432-A2432Z A2499 A2499	A775 to A780, inc. Aggregate A1216 to A1221, inc.	5635001 to 6000000 6500001 to 7000000	93% 93%
1935	A2567	Aggregate A1226 to A1229, inc.	7000001 to 7100000	93%

3658 Benefits under all such policies shall be reduced to the extent indicated in the foregoing schedule but shall be subject to restoration of monthly benefits as hereinafter provided.

(d) Notwithstanding the reduction in benefits and the limitation of the obligation of the Accident Company to make monthly disability payments, as set forth in the preceding paragraph, each holder of any such policy, to be en-
3659 titled to the benefit of the proposed reinsurance agreement, shall be obligated to continue payment of premiums in the amount stipulated in his policy.

14. (a) At the end of five (5) years from the effective date of the contemplated reinsurance agreement, or at such earlier date as may be fixed by the Commissioner, the reserve requirements shall be recomputed and if reserves and funds available for reserves are then sufficient
3660 to justify an increase in the schedule of benefits set forth in paragraph 13(c) hereof, benefit payments on claims then in force at reduced rates and benefits on future claims will be increased to a rate approved by the Commissioner. Thereafter, redetermination of reserve requirements and available reserves for the purpose of adjusting benefit rates shall be made from time to time upon request of the Accident Company or the Commissioner, to the end that full benefit

payments under said policies may ultimately be restored.

(b) Surplus of the Accident Company (not including funds received from the Life Company representing a share of the net profits of its Accident and Health Department) not required for the successful conduct and operation of its business, shall be used for the purpose of restoring benefits under all policies not in benefit and increasing future payments under policies in benefit. Such available funds shall from time to time be added to the reserves for such policies until such time as adequate reserves have been established from the full restoration of such policies, at which time the Accident Company will fully assume and reinsure all such policies not in benefit, and at said time said policies not in benefit shall be deemed to be fully restored.

(c) Funds received from the Life Company, representing one-half of the net profits of its Accident and Health Department, shall be used exclusively for the purpose of making up deficiency in payments of disability benefits to claimants who have been paid less than they were entitled to receive under their policies as originally written.

After policies not in benefit shall have been fully reinsured and a surplus of $2,500,000 shall have been accumulated for Class A ~~stock~~, all surplus funds of the Accident Company ~~not re-~~

quired for the successful conduct and operation of its business, shall be used for the purpose of making up deficiency in payments of disability benefits to claimants who have been paid less than they were entitled to receive under their policies as originally written.

(d) The Accident Company shall not be required to pay or restore full benefits under policies as originally written, except in the manner and to the extent hereinabove set forth.

(e) The Transamerica group agrees to make certain payments to the Accident Company for a period of fifteen (15) years, as set forth in paragraph 12 hereof. Whenever, prior to the expiration of said fifteen year period, full restoration of benefits, not including deficiencies in benefit installments previously paid, shall have been made and there has been full restoration of commissions to agents, and the Accident Company shall have accumulated a surplus of $2,-500,000 for its Class A stock, then upon the happening of those events, the Transamerica group will be released from its obligation to make any further payments. Transamerica group reserves the right to make payment at any time prior to the expiration of said fifteen year period of an amount sufficient to provide a surplus of $2,-500,000 for the Class A stock after providing for full restoration of benefits, not including deficiencies in benefit installments previously

paid, and agents' commissions and upon the making of such payment Transamerica group will be released from its obligation to make any further payments.

Upon full restoration of benefits, payment of deficiencies in benefit installments previously paid and restoration of commissions to agents, the Life Company will be released from its obligation to pay to the Accident Company a portion of the net profits of the Accident and Health Department.

No dividends shall be paid to stockholders of the Accident Company until after full restoration of benefits, payment of deficiencies in benefit installments previously paid and restoration of commissions to agents.

(f) The basis to be used in determining the adequacy of reserves shall be the New York Standard Table, with the variable factor limited to the actual experience of the Pacific Mutual and/or the Accident Company with Non-Can Accident and Health insurance, or such other table or basis as shall be required by the laws of the State of California.

15. All of the Pacific Mutual assets not transferred and delivered to the Life Company, and the proceeds of any claim, right or cause of action collected by the Conservator, shall be transferred, assigned and conveyed to the Accident Company.

3670 16. On the assumption that the value of the assets and the required reserves will be approximately the same on the effective date of the proposed reinsurance agreement as the asset values and reserves set forth in the Convention Examination Report as of December 31, 1935, the attached schedules, designated Schedule A and Schedule B, indicate the approximate amount of assets to be taken over by the Accident Company, the approximate amount of required re-
3671 serves, the approximate amount of liabilities to be assumed and reinsured by the Accident Company, and the capital structure of the Accident Company. The proposal to pay benefits, on claims arising subsequent to July 2, 1936, according to the schedule of reduced benefits hereinabove set forth, is based upon the figures and statistics contained in the Convention Examination Report of the business and condition of the Pacific Mutual as of December 31, 1935,
3672 and shall be subject to examination, verification, adjustment and extension of the data contained in said report, to the effective date of the agreement contemplated by this proposal.

17. Representation on the Board of Directors of the Accident Company will be offered to interested groups of policyholders and agents; and in the conduct of its business the Accident Company will retain all satisfactory employees of the Pacific Mutual.

3673 18. The Accident Company shall have the right to engage in a general accident and health insurance business.

19. The Accident Company will enter into equitable agreements with such agents of the Pacific Mutual as desire to become associated with the Accident Company, and so long as any such agent remains in the service of the Accident Company, renewal commissions will be paid
3674 such agent on policies written by him for the Pacific Mutual and reinsured by the Accident Company, in accordance with the terms and provisions of his Pacific Mutual agency contract covering such business, as herein modified. This proposal contemplates the temporary payment of disability benefits under the Non-Can policies on a reduced basis. It is believed that agents are interested in the restoration of full
3675 benefit payments under Non-Can policies at the earliest practicable date and, to that end, are willing to cooperate with proponent by deferring payment of a part of their commissions which would otherwise be payable to them. It is proposed that commissions payable to agents on Non-Can policies shall be adjusted by a reduction thereof corresponding to the percentage of reduction of benefit payments in effect

for each class of policies as shown in the schedule hereinabove set forth. As the rate of benefit payments under policies is increased, commissions to agents will at the same time be correspondingly increased.

20. The Accident Company will agree to pay the Conservator a sum equal to all legal and valid claims filed with the Conservator and allowed by the Court, except valid claims of any character which may be allowed by the Court and paid by the Conservator prior to the transfer and delivery of Pacific Mutual assets to the Accident Company. In the event that claims of any kind not specifically assumed by the Life Company and not arising out of the business transacted by said Company on its own account, shall be asserted against the Life Company and the Life Company shall be required by the final judgment of any court of competent jurisdiction to pay or discharge such claims, or in case the Life Company is made a party defendant in any suit or suits arising out of the pending proceedings, the Accident Company shall reimburse the Life Company for all amounts so determined and paid and also its reasonable costs and expenses incurred in connection with any such litigation.

3679 The foregoing sets forth the essential features of the plan of the Transamerica group for the reinsurance of the business of the Pacific Mutual. If this proposal is accepted, appropriate agreements will be prepared and executed which will clearly and definitely express the intentions and the obligations of the parties thereto. In addition to the matters outlined in this proposal such agreements will contain such other provi-
3680 sions as may be mutually agreed upon by the Conservator and the Transamerica group, including such provisions as are usually contained in reinsurance agreements.

If, in the opinion of the Conservator and the Court, the proposal hereinabove outlined can be modified so as to facilitate and make more effective its purposes the Transamerica group will give careful and sympathetic consideration to
3681 any suggestions for the improvements of its general plan, to the end that all interested persons, and particularly policyholders in all groups, may be accorded treatment that is as fair, just and equitable as it is possible to secure under all the circumstances.

Dated at Los Angeles, California, October 17, 1936.

L. M. GIANNINI

3682

Schedule A-1

NEW LIFE COMPANY

OPENING FINANCIAL STATEMENT ASSUMING ASSETS AND RESERVES CORRESPONDING IN AMOUNT WITH AMOUNTS CONTAINED IN SCHEDULE A

ASSETS

3683 Cash - Paid in By Transamerica Group	$ 3,000,000.00	
Net Assets - Life Dept.	182,178,026.60	
Net Assets - Acc. & Health Dept.	2,809,664.33	
Total Assets		$187,987,690.93

3684 LIABILITIES, RESERVES AND CAPITAL

Total Liabilities and Reserves	184,987,690.93	
Capital Stock	1,000,000.00	
Paid-In Surplus	2,000,000.00	
Total Liabilities, Reserves and Capital		$187,987,690.93

3685 Schedule B

ACCIDENT COMPANY OPENING FINANCIAL STATEMENT

ASSUMING ASSETS CORRESPONDING IN AMOUNTS WITH AMOUNTS CONTAINED IN SCHEDULE A, AND USING RESERVES REQUIRED TO MAINTAIN BENEFIT PAY-
3686 MENTS ON NON-CANCELLABLE POLICIES AT THE RATES SET FORTH IN PARAGRAPH 13 (c) OF THE FOREGOING PROPOSAL

ASSETS

3687 Cash paid in by Transamerica Group under foregoing proposal	$ 1,608,200.00
Deferred Receivables	7,500,000.00
Other Net Assets	29,929,511.17
Total Assets	$39,037,711.17

3688

LIABILITIES, RESERVES AND CAPITAL

Liabilities		$ 860,107.00
Reserves:		
Required to provide benefits set forth in Paragraph 13 (c) of foregoing proposal	$10,525,000.00	
Required for Loss and Claims in force	19,643,031.00	30,168,031.00
3689 Total Liabilities & Reserves		$31,028,138.00
Capital Stock		
Class A Common - 254,100 sh. par value $1		
Class B Common - 254,100 sh. par value $1		509,573.17
°Deferred Surplus		7,500,000.00
3690 Total Liabilities, Reserves & Capital		$39,037,711.17

°The deferred surplus represents the future payments of $500,000 per year to be paid by the Transamerica group in accordance with the terms of the foregoing proposal. In addition, there is a further deferred surplus not reflected in the above statement, consisting of 50% of the profits of the Accident and Health Department of the Life Company payable in accordance with the terms of the foregoing proposal.

3691

Schedule A

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA

Schedule of Net Assets, Liabilities and Surplus or Deficit for Life, General Accident and Health (exclusive of non-can), and Non-cancellable Accident & Health Departments

Constructed from Convention Examination Report - December 31, 1935

3692

	LIFE	ACCIDENT & HEALTH	NON-CAN	TOTAL
Net Assets	$187,893,222.60		$27,023,979.50	$214,917,202.10
Net Reserves:				
For Policies & Ann.	154,989,200.00			154,989,200.00
Unearned Prem.		$1,107,357.25	1,796,570.87	2,903,928.12
Non-can policies			24,685,977.00	24,685,977.00
3693 Losses & Claims	1,343,558.00	690,178.00	19,643,031.00	21,676,767.00
Disability	10,120,656.00			10,120,656.00
Sup. Contracts	5,718,710.00			5,718,710.00
Est. Claim Exp. Liab.		38,858.00	824,481.00	863,339.00
Com. Payable		104,400.00	35,626.00	140,026.00
Asset Val. Reserves	2,103,349.94	440,000.00		2,543,349.94
Taxes Accrued	570,560.52	204,223.27		774,783.79
Other Liab.	7,331,992.14	224,647.81		7,556,639.95

Total Liabilities and Reserves	182,178,026.60	2,809,664.33	46,985,685.87	231,973,376.80
Surplus or *deficit	5,715,196.00	*2,809,664.33	*19,961,706.37	*17,056,174.70
Surplus Assets in Life Dept. to be transferred to Acc. & Health & Non-can Departments	5,715,196.00	2,809,664.33	2,905,531.67	
*Deficit			*17,056,174.70	*17,056,174.70
Assets for Each Dept. after transferring Life Dept. Surplus Assets to Acc. Dept.	182,178,026.60	2,809,664.33	29,929,511.17	214,917,202.10

(*Refers to deficit)

Verified.

Endorsed: Received copy of the within appearance this 19 day of October, 1936. U. S. Webb et al, attorneys for petitioner, by Frank L. Guerena.

Filed 9:55 a. m., Oct. 19, 1936. L. E. Lampton, county clerk; by M. Zimmerman, deputy.

3697 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondent, Pacific Mutual Life Insurance Company, intervenor. No. 404673.

3698 **Return of Alfred F. MacDonald to Order to Show Cause.**

Comes now Alfred F. MacDonald, a policy holder and person interested in the above entitled proceedings and files this, his return to the order to show cause issued by the above entitled court on the 25th day of September, 1936, and his objections to the proceedings in said cause, as follows:

3699 I.

That at all times herein menitoned, objector was and now is, the owner and holder of Noncancellable Income Policy Number 5514395 (Form A 383) issued by the Pacific Mutual Life Insurance Company of California, the respondent above named; that all premiums due upon the policy aforesaid have been paid and said policy is now in full force and effect.

3700 II.

Objector objects to the

a. Ratifying, confirming and approving the acts of said conservator in causing to be formed, forming, and subscribing to and purchasing the capital stock of, Pacific Mutual Life Insurance Company, a California corporation;

b. Ratifying, confirming and approving the transfer and conveyances heretofore made of the
3701 assets, properties, books and records of The Pacific Mutual Life Insurance Company of California to Pacific Mutual Life Insurance Company;

c. Ratifying, confirming and approving a Rehabilitation and Reinsurance Agreement, dated July 22, 1936, with such amendments as may be proposed prior to or at the hearing hereon as provided in said petition, proposed to be executed by and between said conservator and said Pacific
3702 Mutual Life Insurance Company (a copy of which said agreement is attached to the petition of said conservator for the within order to show cause) and authorizing and directing said conservator to execute and enter into said agreement.

III.

The objections aforesaid are made upon the following grounds, to-wit:

a. That the proposed plan of rehabilitation is not the best possible plan for the protection of

3703 this objector and other policy holders in The Pacific Mutual Life Insurance Company of California, similarly situated;

b. That said plan, if adopted or approved by this court, will render the policy owned and held by this objector, practically worthless;

c. That said plan undertakes to substitute some fractional liability by the Pacific Mutual Life Insurance Company for the obligations of The Pacific Mutual Life Insurance Company of
3704 California, to this objector;

d. That said plan, if carried out, would constitute a violation of this objector's rights under sections 7, 11, 13, 16, 21 and 22 of Article 1 and section 1 of Article 3, and section 1 of Article 12 of the Constitution of the state of California, and also section 1 of the 14th Amendment to the Constitution of the United States of America.

3705

IV.

This objector objects to any plan or scheme which would impair in any manner or way, the obligation of this objector's contract with The Pacific Mutual Life Insurance Company of California.

V.

This objector objects to all proceedings and orders heretofore or hereafter made by the above

entitled court in the above proceeding on the ground that each, every and all of the laws and statutes upon which such proceedings or orders were based, are, and each of them is, unconstitutional and void.

VI.

Objector objects to each, every and all of the orders heretofore made in the above entitled proceeding on the grounds and for the reason that the true facts of the case could not and would not justify the making of said order.

Wherefore, this objector prays that the objections hereinbefore taken to the proceedings in the above entitled matter be allowed and sustained and that appropriate orders be made by the above entitled court setting aside and vacating each, every and all of the orders heretofore made in the above entitled proceedings and restoring this objector to the same status that he occupied before said proceedings were instituted.

ALFRED F. MACDONALD,
In Propria Persona

Endorsed: Filed Oct. 19, 1936, 10:19 a. m. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

3709 [TITLE OF COURT AND CAUSE.]

Return.

Comes now Harry Bryant Robinson, Frank Clement Robinson, Milo F. Smith, Wales Mac Perdue, policy holders and persons interested in the above entitled proceedings and file through their attorney, Henry C. Huntington, their return to the order to show cause issued by the above entitled court on the 25th day of September, 1936,
3710 and their objections to the proceedings in said cause, as follows:

I.

That at all times herein mentioned, each objector was and now is, the owner and holder of a Non-cancellable Income Policy issued by the Pacific Mutual Life Insurance Company of California, the respondent above named, as follows, to-wit:

3711 Harry Bryant Robinson, Policy No. 4612675, issued April 1, 1921;

Frank Clement Robinson, Policy No. 4622388, issued August 31, 1921;

Milo F. Smith, Policy No. 774795;

Wales Mac Perdue, Policy No. 4647283 and Policy No. 536351;

that all premiums due upon the policies aforesaid have been paid and said policies are now in full force and effect.

3712 II.

Objectors object to the

a. Ratifying, confirming and approving the acts of said conservator in causing to be formed, forming, and subscribing to and purchasing the capital stock of, Pacific Mutual Life Insurance Company, a California corporation;

b. Ratifying, confirming and approving the transfer and conveyances heretofore made of the assets, properties, books and records of The
3713 Pacific Mutual Life Insurance Company of California to Pacific Mutual Life Insurance Company;

c. Ratifying, confirming and approving a Rehabilitation and Reinsurance Agreement, dated July 22, 1936, with such amendments as may be proposed prior to or at the hearing hereon as provided in said petition, proposed to be executed by and between said conservator and said Pacific Mutual Life Insurance Company (a copy of
3714 which said agreement is attached to the petition of said conservator for the within order to show cause) and authorizing and directing said conservator to execute and enter into said agreement.

III.

The objections aforesaid are made upon the following grounds, to-wit:

a. That the proposed plan of rehabilitation is not the best possible plan for the protection of

these objectors and other policy holders in The Pacific Mutual Life Insurance Company of California, similarly situated;

b. That said plan, if adopted or approved by this court, will render the policies owned and held by these objectors practically worthless;

c. That said plan undertakes to substitute some fractional liability by the Pacific Mutual Life Insurance Company for the obligations of The Pacific Mutual Life Insurance Company of California, to these objectors;

d. That said plan, if carried out, would constitute a violation of these objectors' rights under sections 7, 11, 13, 16, 21 and 22 of Article 1 and section 1 of Article 3, and section 1 of Article 12 of the Constitution of the state of California, and also section 1 of the 14th Amendment to the Constitution of the United States of America.

IV.

These objectors object to any plan or scheme which would impair in any manner or way, the obligation of these objectors' contract with The Pacific Mutual Life Insurance Company of California.

V.

These objectors object to all proceedings and orders heretofore or hereafter made by the above entitled court in the above proceeding on the

ground that each, every and all of the laws and statutes upon which such proceedings or orders were based, are, and each of them is, unconstitutional and void.

VI.

Objectors object to each, every and all of the orders heretofore made in the above entitled proceeding on the grounds and for the reason that the true facts of the case could not and would not justify the making of said order.

Wherefore, these objectors pray that the objections hereinbefore taken to the proceedings in the above entitled matter be allowed and sustained and that appropriate orders be made by the above entitled court setting aside and vacating each, every and all of the orders heretofore made in the above entitled proceedings and restoring these objectors to the same status that they occupied before said proceedings were instituted.

HENRY C. HUNTINGTON,
HENRY C. HUNTINGTON,
Attorney for Policy Holders.

Endorsed: Filed Oct. 19, 1936, 10:19 a. m. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

3721 [TITLE OF COURT AND CAUSE.]

Return of Austin O. Martin to Order to Show Cause.

Comes now Austin O. Martin, a policy holder and person interested in the above entitled proceedings, and files through his attorney, Rex Hardy, Esq., this, his return to the order to show cause heretofore issued by the above en-
3722 titled court on the 23rd day of July, 1936, and his objections to the proceedings in said cause are as follows:

I.

That at all times herein mentioned this objector was and now is the owner and holder of non-cancellable income policy No. 4602219, issued September 20, 1920 by the Pacific Mutual Life Insurance Company of California; that all prem-
3723 iums heretofore accruing and due upon said policy have been paid and by the terms thereof, said policy is now in full force and effect.

II.

This objector now and hereby objects to—

(a) The confirming and approving and ratifying of the permission given with respect to that certain plan and agreement of rehabilitation, sale and transfer of assets and the reinsurance of the respondent herein, which said plan and

agreement of rehabilitation is referred to in the order to show cause issued herein on July 23, 1936, and the carrying out of the terms and provisions thereof;

(b) The confirming and approving of the action of Samuel L. Carpenter, Jr., as the Insurance Commissioner of the state of California, and as liquidator and conservator of the respondent herein, and the action of the intervener herein in making, executing and carrying out of that certain agreement provided for in said plan and agreement;

(c) The confirming and approving of the execution and delivery of the deed and bill of sale attached to the petition of the petitioner herein for the purpose of transferring and setting over to the intervener herein all of the assets of the respondent herein;

(d) Each and every and all of the proceedings had and taken up to and including the issuance of said order to show cause on the 23rd day of July, 1936, by the Honorable Douglas L. Edmonds, judge of the above entitled court;

(e) Each and every and all of the proceedings proposed to be taken and had in connection with the above *entitle* proceedings.

3727 III.

The objections hereinbefore made are upon the following grounds, to-wit:

(a) That said permission and the order given in respect to said plan and the agreement of rehabilitation is unlawful and void for the reason that no proper hearing thereof has been had as required by the laws of the state of California;

3728 (b) That the proposed plan of rehabilitation is not the best possible plan for the protection of this objector and other policy holders of the respondent similarly situated;

(c) That said plan, if adopted or approved by this court will render the policy owned and held by this objector practically worthless;

(d) That said plan undertakes to substitute
3729 some fractional liability of the intervener for the obligations of the respondent to this objector;

(e) That said plan, if carried out, will constitute a violation of the objector's rights under the Constitutions of the state of California and of the United States of America.

IV.

That this objector objects to any plan or scheme which would impair in any manner or

3730 way the obligations of the contracts held by this objector with respondent.

V.

That this objector objects to all proceedings or orders heretofore or hereafter to be made by the above entitled court in the above proceedings upon the ground that each and every and all of the laws and statutes upon which such proceed-
3731 ings and orders were and are based, are, and each of them is, unconstitutional and void.

VI.

That this objector objects to each and every and all of the orders heretofore made in the above entitled proceeding upon the grounds and for the reasons that the true facts in this case could not and would not justify the making of said orders and tend to depreciate and impair the obligations
3732 of the respondent to this objector upon the contract held by this objector as aforesaid, because of which this objector has for many years paid large sums of money to the respondent upon its obligations therein expressed.

VII.

That this objector hereby refers to the objections heretofore or hereafter to be filed by other persons in a similar situation and to all com-

plaints in intervention heretofore or hereafter to be filed by persons in a similar situation, all in respect to the above entitled proceedings and by such reference hereby adopts each and all of said objections and said interventions and incorporates the same as a part of this return.

Wherefore, this objector prays that the objections hereinabove taken be allowed and sustained and that appropriate orders be made by the above entitled court, setting aside and vacating each and every and all of the orders heretofore made in the above entitled proceedings and restoring this objector to the same status that he occupied before said proceedings were instituted and leaving to this objector his rights and privileges and benefits as in said contract of insurance specified.

REX HARDY,

Attorney for Objector, Austin O. Martin.

Verified.

Endorsed: Received copy of the within return this 19th day of October, 1936. Mitchell, Silberberg & Knupp, attorneys for petitioner.

Filed Oct. 19, 1936, 4:53 p. m. L. E. Lampton, county clerk; by J. C. Gordon, deputy.

3736 [TITLE OF COURT AND CAUSE.]

Return of Rex Hardy to Order to Show Cause.

Comes now Rex Hardy, a policyholder and person interested in the above entitled proceedings, and files in *propria persona* this, his return to the order to show cause heretofore issued by the above entitled court on the 23rd day
3737 of July, 1936, and his objections to the proceedings in said cause are as follows:

I.

That at all times herein mentioned this objector was and now is the owner and holder of three (3) certain non-cancellable income policies, as follows:

No. 4647743, Form A292, issued April 30,
3738 1935;

No. 4647744, issued April 30, 1924;

No. 5503407, issued December 24, 1926;

all by the Pacific Mutual Life Insurance Company of California; that all premiums heretofore accruing and due upon each and all of the policies aforesaid have been paid and by the terms of each thereof, said policies are now in full force and effect.

3739 II.

This objector now and hereby objects to the—

(a) Confirming and approving and ratifying the permission given with respect to that certain plan and agreement of rehabilitation, sale and transfer of assets and the reinsurance of the respondent herein, which said plan and agreement of rehabilitation is referred to in the order to show cause issued herein on July 23, 1936, and the carrying out of the terms and provisions
3740 thereof:

(b) Confirming and approving of the action of Samuel L. Carpenter, Jr., as the Insurance Commissioner of the State of California, and as liquidator and conservator of the respondent herein, and the action of the intervener herein in making, executing and carrying out of that certain agreement provided for in said plan and agreement;

3741 (c) The confirming and approving of the execution and delivery of the deed and bill of sale attached to the petition of the petitioner herein for the purpose of transferring and setting over to the intervener herein all of the assets of the respondent herein;

(d) Each and every and all of the proceedings had and taken up to and including the issuance of said order to show cause on the 23rd day of July, 1936, by the Honorable Douglas L. Edmonds, judge of the above entitled court;

3742 (e) Each and every and all of the proceedings proposed to be taken and had in connection with the above entitled proceedings.

III.

The objections hereinbefore made are upon the following grounds, to-wit:

(a) That said permission and the order given in respect to said plan and the agreement of rehabilitation is unlawful and void for the reason that no proper hearing thereof has been 3743 had as required by the laws of the State of California;

(b) That the proposed plan of rehabilitation is not the best possible plan for the protection of this objector and other policyholders of the respondent similarly situated;

(c) That said plan, if adopted or approved by this court, will render the policy owned and held by this objector practically worthless;

3744 (d) That said plan undertakes to substitute some fractional liability of the intervenor for the obligation of the respondent to this objector;

(e) That said plan, if carried out, will constitute a violation of this objector's rights under the Constitution of the State of California and of the United States of America.

IV.

That this objector objects to any plan or scheme which would impair in any manner or

3745 way the obligations of the contracts held by this objector with respondent.

V.

That this objector objects to all proceedings or orders heretofore or hereafter to be made by the above entitled court in the above proceedings upon the ground that each and every and all of the laws and statutes upon which such proceedings and orders were and are based, are, and each of them is, unconstitutional and void.

3746

VI.

That this objector objects to each and every and all of the orders heretofore made in the above entitled proceeding upon the grounds and for the reasons that the true facts in this case could not and would not justify the making of said orders and tend to depreciate and impair the obligations of the respondent to this objector upon the contracts held by this objector 3747 as aforesaid, because of which this objector has for many years paid large sums of money to the respondent upon its obligations therein expressed.

VII.

That this objector hereby refers to the objections heretofore or hereafter to be filed by other persons in a similar situation and to all complaints in intervention heretofore or hereafter to be filed by persons in a similar situ-

ation, all in respect to the above entitled proceedings and by such reference hereby adopts each and all of said objections and said interventions and incorporates the same as a part of this return.

Wherefore, this objector prays that the objections hereinabove taken be allowed and sustained and that appropriate orders be made by the above entitled court, setting aside and vacating each and every and all of the orders heretofore made in the above entitled proceedings and restoring this objector to the same status that he occupied before said proceedings were instituted and leaving to this objector his rights and privileges and benefits as in each and all of the hereinbefore mentioned contracts of insurance specified.

REX HARDY,

In Propria Persona.

Verified.

Endorsed: Received copy of the within return this 19th day of October, 1936. Mitchell, Silberberg & Knupp, attorneys for petitioner.

Filed Oct. 19, 1936, 4:53 p. m. L. E. Lampton, county clerk; by J. C. Gordon, deputy.

3751 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., etc., petitioner, vs. The Pacific Mutual Life Insurance Company of California, respondents. No. 404673.

Objections of Roscoe R. Hess to Rehabilitation and Reinsurance Agreement.

Comes now Roscoe R. Hess, a non-cancellable policyholder in the respondent corporation, and
3752 party in interest in the above entitled matter, and appearing in response to the order to show cause with respect to rehabilitation and reinsurance, dated September 25, 1936, respectfully alleges, represents and by way of objection to the orders proposed to be made as recited in said order to show cause, objects as follows:

I.

That the undersigned is the owner and holder
3753 of two "non-can policies," as said term is defined in the proposed Rehabilitation and Reinsurance Agreement referred to in paragraph #3 of said order to show cause, which policies are in full force and effect, and are numbered and dated as follows:

No. 4610222 dated June 1, 1921

No. 4619043 dated July 21, 1921

That the undersigned has a contingent claim against the "Old Company," contingent upon

payment *by* premiums by undersigned on said policies according to their terms, and the happening of events and disabilities therein mentioned.

II.

That he objects to the making of each and all of the orders described in said order to show cause upon the following grounds:

A. That the conservator is without authority in law to organize or to subscribe to the stock of any corporation or to use the assets of an insolvent insurance company for the purpose of organizing a new insurance company or to purchase the stock in such new company and that the court is without authority to authorize the organization of a new company as provided for in said orders and in said so-called Rehabilitation and Reinsurance Agreement.

B. That the moneys which said Insurance Commissioner proposes to use for the purchase of said stock, all properly belong to and are a part of the assets of the Old Company, and that the Insurance Commissioner is without power or authority to use any of such assets for the purpose of protecting the interests of policyholders of one class as against those of another class.

C. That neither the Insurance Commissioner nor the court has the power or authority to prefer one class of policyholders over another class.

3757 D. That said Rehabilitation and Reinsurance Agreement is discriminatory and prefers certain classes of policyholders, to-wit: the life policyholders as against non-cans; that, in fact, all other policies issued by the Old Company are reinsured by the New Company for the full face amount thereof, excepting only the non-cans, whose benefits are reduced to certain fixed percentages, ranging from 20% to 90%; that such unequal and discriminatory treatment of said
3758 policyholders is inequitable and contrary to law, prefering what, in legal effect, are certain classes of creditors as against another class of creditors, without any basis in law therefor.

E. That the objection set forth in the preceding paragraph "D" hereof, is not overcome by the provisions of said Rehabilitation and Reinsurance Agreement, providing for possible future restoration of benefits to said non-cans out of certain profits of said New Company; that
3759 all of the other policyholders are re-insured in full under the agreement at the present time and are not required to postpone any enjoyment of their rights and privileges and the receipt of the benefits called for by their policies, but only this one class of policies is required to do so; that so far as restoration of benefits to the non-cans in the future is concerned, under said Rehabilitation and Reinsurance Agreement, such restoration is left entirely discretionary with the Board of Directors of said New Company as set forth

in paragraph #14, page #18 of said Rehabilitation and Reinsurance Agreement, except that the Commissioner may at the time of any examination of the New Company require the transfer of additional funds to the special fund from which restoration of benefits may be declared by the Board of Directors. The inevitable, if not the intended, result of such discretionary power permitting the Board of Directors to use the funds available for its general corporate business to accumulate a large surplus, is to postpone the restoration of benefits to the non-cans, causing lapsations of non-can policies. The fact that the surplus is accumulated, thereby adding value to the non-cans and involving a necessary restoration at some time in the future, will not prevent such lapsation because the average non-can policyholder will look to the benefits which are being actually paid to non-cans who become disabled to ascertain whether or not it is worth while to continue the payment of premiums. Since the plan as proposed to the court is the work largely of the Commissioner and representatives of stockholders, the conclusion is almost inescapable that the administration of the plan, like the design and intent thereof, is bound to favor the interests of the stockholders which will be promoted by such lapsations.

F. That the Insurance Commissioner and the court are, and that each of them is, without

3763 power to prefer one class of policyholders over another class, and that said attempted sale of assets is a sale in name only and is made for the purpose of accomplishing in an apparently legal manner that which it is unlawful to do.

G. That the court has no power to prefer holders of life insurance policies in The Pacific Mutual Life Insurance Company of California, over holders of non-cancellable income policies in the same company.

3764 H. That said Insurance Commissioner is without power to enter into a contract of reinsurance which prefers one class of risks over another.

I. That the Insurance Commissioner is without power to part with the assets securing the contracts of insurance of The Pacific Mutual Life Insurance Company of California, without reinsuring the risks covered thereby, and that

3765 he is without power to reinsure a part only of the risks.

J. That the orders herein sought to be ratified are unjust, unconscionable and inequitable.

K. That the orders herein sought to be ratified permitting the transfer of the assets of the insolvent company to a new company and the absence of provisions for reinsurance of non-can policies upon a basis commensurate with reinsurance of other policies violates Section 10, Article I of and the Fourteenth Amendment of

3766 the Constitution of the United States, and Article I, Section 21, of the Constitution of the State of California.

L. That your objector has filed a proposed plan of rehabilitation in court and refers to the same as though fully set forth herein and alleges that said plan is more equitable to all persons involved than said agreement proposed by the Commissioner.

3767

M. That the Insurance Commissioner has no authority to reinsure or to rehabilitate except subject to such liens as may be equitably necessary as provided in Section 1043 of the Insurance Code; that the purposes of said section are in accordance with the usual practice where there is an impairment of the reserves of a life insurance company; that in order to make good

3768 such impairment, it is equitably necessary to place or impose a lien upon all policies alike, and thereupon to permit the insolvent company to continue business as a going concern.

N. That the Rehabilitation and Reinsurance Agreement is inequitable in providing for reinsurance of non-can policies on a reduced basis in Conservatorship and thereby automatically reducing the amount of their claims in the event of a subsequent order of liquidation, in which

event the rights of non-can policyholders are fixed as of the date of the entry of the order of liquidation in the office of the county clerk pursuant to Section 1019 of the Insurance Code.

O. That the Rehabilitation and Reinsurance Agreement provides no valid method for the determination or payment of claims of creditors or non-can policyholders who do not accept reinsurance under the agreement and provides no immediately available fund therefor.

Wherefore your objector prays that the petition for approval of the Rehabilitation and Reinsurance Agreement be denied and that none of said orders set forth in the order to show cause be made.

Respectfully submitted,

ROSCOE R. HESS,
DAVID R. RUBIN,
Attorneys for said Objector.

Endorsed: Received copy of the within objections this 19 day of October, 1936. U. S. Webb, Atty. Gen.; Frank L. Guerena; Mitchell, Silberberg & Knupp, per Peery Price, attorney for pltff.

Filed Oct. 19, 1936. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

3772 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation respondent, and Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel, respondents and interveners. No. 404673.

3773 **Return on Order to Show Cause With Respect to Rehabilitation and Reinsurance.**

Leave of court so to do first being had and obtained, the respondents and interveners above named, upon their own behalf and upon behalf of each of them, and upon behalf of all general agents and managers of The Pacific Mutual Life Insurance Company of California, a corporation, respondent herein, intervene herein and file this their return on order to show cause with
3774 respect to rehabilitation and reinsurance of date September 25, 1936.

I.

Respondents and each of them adopt and incorporate herein as though in this paragraph fully set forth, and by such adoption and incorporation allege as a part of this return, each of the allegations, denials and admissions contained in paragraphs I to VII, inclusive, of that certain complaint in intervention of The Pacific

3775 Mutual Agency, an association, filed herein on, to wit, the 28th day of August, 1936.

II.

That respondent C. C. Day on, to-wit, the 20th day of August, 1910, entered into a contract with said respondent company, or Old Company, under and pursuant to the terms and provisions of which contract said respondent was appointed and since said date has continuously continued to act in the states of Oklahoma
3776 and Kansas as general agent of said Old Company for the purpose of securing life insurance contracts for and on behalf of said Old Company with residents of said territory, and during said period and on behalf of said Old Company, under the terms of said contract, has secured many such contracts of life insurance; that by reason thereof and pursuant to the terms of said contract, said respondent is entitled to receive
3777 and heretofore has received from said Old Company, or respondent company, commissions in various amounts of money, amounting to many thousands of dollars annually, on various policies of life insurance and upon various contracts of insurance, all of which have been secured, closed, completed and/or written by and/or on behalf of said respondent company or Old Company at the instance of and as the result of the industry, ability and negotiations conducted by said respondent C. C. Day and/or by subagents of said

3778 respondent company acting under and at the direction of said respondent C. C. Day.

That said respondent C. C. Day, under the terms of said contract with said Old Company, is entitled to receive, and prior to the 22nd day of July, 1936, had been receiving, commissions upon renewals of said contracts or policies of life insurance theretofore procured by him as said agent of said Old Company. That the commissions upon said renewals to which said re-
3779 spondent is entitled amount annually to a large sum of money, to wit, to a sum in excess of twenty-five thousand dollars ($25,000.00).

III.

That respondent Harry C. Fabling on, to wit, the 21st day of November, 1906, entered into a contract with said respondent company, or Old Company, under and pursuant to the terms and provisions of which contract said respondent was
3780 appointed and since said date has continuously continued to act in the states of Colorado and Wyoming as general agent of said Old Company for the purpose of securing life insurance contracts for and on behalf of said Old Company with residents of said territory, and during said period and on behalf of said Old Company, under the terms of said contract, has secured many such contracts of life insurance; that by reason thereof and pursuant to the terms of said contract, said respondent is entitled to receive and

heretofore has received from said Old Company, or respondent company, commissions in various amounts of money, amounting to many thousands of dollars annually, on various policies of life insurance and upon various contracts of insurance, all of which have been secured, closed, completed and/or written by and/or on behalf of said respondent company, or Old Company, at the instance of and as the result of the industry, ability and negotiations conducted by said respondent Harry C. Fabling and/or by subagents of said respondent company acting under and at the direction of said Harry C. Fabling.

That said respondent Harry C. Fabling, under the terms of said contract with said Old Company, is entitled to receive and prior to the 22nd day of July, 1936, has been receiving, commissions upon renewals of said contracts or policies of life insurance theretofore procured by him as said agent of said Old Company. That the commissions upon said renewals to which said respondent is entitled amount annually to a large sum of money, to wit, to a sum in excess of twenty-five thousand dollars ($25,000.00).

IV.

That respondent Joseph M. Gantz on, to wit, the 23rd day of April, 1918, entered into a contract with said respondent company, or Old Company, under and pursuant to the terms and provisions of which contract said respondent was

3784 appointed and since said date has continuously continued to act in the states of Ohio and Kentucky as general agent of said Old Company for the purpose of securing life insurance contracts for and on behalf of said Old Company with residents of said territory, and during said period and on behalf of said Old Company, under the terms of said contract, has secured many such contracts of life insurance; that by reason thereof and pursuant to the terms of said con-
3785 tract, said respondent is entitled to receive and heretofore has received from said Old Company, or respondent company, commissions in various amounts of money, amounting to many thousands of dollars annually, on various policies of life insurance and upon various contracts of insurance, all of which have been secured, closed, completed and/or written by and/or on behalf of said respondent company, or Old Company, at the instance of and as the result of the in-
3786 dustry, ability and negotiations conducted by said respondent Joseph M. Gantz and/or by subagents of said respondent company acting under and at the direction of said respondent Joseph M. Gantz.

That said respondent Joseph M. Gantz, under the terms of said contract with said Old Company, is entitled to receive, and prior to the 22nd day of July, 1936, had been receiving, commissions upon renewals of said contracts or policies

3787 of life insurance theretofore procured by him as said agent of said Old Company. That the commissions upon said renewals to which said respondent is entitled amount annually to a large sum of money, to wit, to a sum in excess of twenty-five thousand dollars ($25,000.00).

V.

That respondent Jack Paschall on, to wit, the 5th day of March, 1909, entered into a contract with said respondent company, or Old Company, 3788 under and pursuant to the terms and provisions of which contract said respondent was appointed and since said date has continuously continued to act in the state of California as general agent of said Old Company for the purpose of securing commercial and non-cancellable contracts of insurance for and on behalf of said Old Company with residents of said territory, and during said period and on behalf of said Old Company, under the terms of said contract, has secured many 3789 such contracts of commercial insurance; that by reason thereof and pursuant to the terms of said contract, said respondent is entitled to receive and heretofore has received from said Old Company, or respondent company, commissions in various amounts of money, amounting to many thousands of dollars annually, on various policies of commercial insurance, all of which have been secured, closed, completed and/or written by and/or on behalf of said respondent company or

3790 Old Company at the instance of and as the result of the industry, ability and negotiations conducted by said respondent Jack Paschall and/or by sub-agents of said respondent company acting under and at the direction of said respondent Jack Paschall.

That said respondent Jack Paschall, under the terms of said contract with said Old Company, is entitled to receive, and prior to the 22nd day of July, 1936, had been receiving, commissions
3791 upon renewals of said contracts or policies of commercial insurance theretofore procured by him as said agent of said Old Company. That the commissions upon said renewals to which said respondent is entitled amount annually to a large sum of money, to wit, to a sum in excess of twenty-five thousand dollars ($25,000.00).

VI.

That respondent Ralph J. Wetzel on, to wit,
3792 the 16th day of April, 1923, entered into a contract with said respondent company, or Old Company, under and pursuant to the terms and provisions of which contract said respondent was appointed and since said date has continuously continued to act in the states of Missouri and Kansas as general agent of said Old Company for the purpose of securing life insurance contracts for and on behalf of said Old Company with residents of said territory, and during said period and on behalf of said Old Company, under

3793 the terms of said contract, has secured many such contracts of life insurance; that by reason thereof and pursuant to the terms of said contract, said respondent is entitled to receive and heretofore has received from said Old Company, or respondent company, commissions in various amounts of money, amounting to many thousands of dollars annually, on various policies of life insurance and upon various contracts of in-
3794 surance, all of which have been secured, closed, completed and/or written by and/or on behalf of said respondent company or Old Company, at the instance of and as the result of the industry, ability and negotiations conducted by said respondent Ralph J. Wetzel and/or by subagents of said respondent company acting under and at the direction of said respondent Ralph J. Wetzel.

3795 That said respondent Ralph J. Wetzel, under the terms of said contract with said Old Company, is entitled to receive, and prior to the 22nd day of July, 1936, had been receiving, commissions upon renewals of said contracts or policies of life insurance theretofore procured by him as said agent of said Old Company. That the commissions upon said renewals to which said respondent is entitled amount annually to a large sum of money, to wit, to a sum in excess of twenty-five thousand dollars ($25,000.00).

3796 VII.

That respondent, Carroll C. Day, is named as the insured in and is the holder of those certain policies of life insurance issued by respondent, The Pacific Mutual Life Insurance Company of California, a corporation of policy numbers and date of issuance and in the amounts as follows:

	Policy Number	Date of Issue	Amount
3797 (1)	253470	1/11/33	$ 2,500.00
(2)	265215	2/ 3/32	2,500.00
(3)	277598	1/28/33	8,700.00
(4)	445812	1/ 5/33	5,000.00
(5)	445813	1/ 5/33	2,500.00
(6)	445814	1/ 5/33	2,500.00
(7)	583862	6/25/34	25,000.00
(8)	666723	6/28/34	25,000.00
(9)	737888	7/25/34	10,000.00
(10)	779876	1/14/31	10,000.00
(11)	807263	12/22/31	10,000.00

3798 That said respondent is also named as the insured in and is the owner and holder of non-cancelable income policy number 4642392, dated October 16, 1923, providing for the payment of indemnity of $300.00 per month during the continuance of disability resulting from accidental means or sickness and consisting of a continuous total loss of business time.

That all premiums heretofore coming due on each of said policies have been fully paid, and on

July 22, 1936, each of said policies was and still is in full force, virtue and effect.

VIII.

That respondent, Harry C. Fabling, is named as the insured in and is the holder of those certain policies of life insurance issued by respondent, The Pacific Mutual Life Insurance Company of California, a corporation, of the policy numbers and date of issuance and in the amounts as follows:

	Policy Number	Date of Issue	Amount
(1)	373492	12/12/19	$ 1,000.00
(2)	359397	6/30/19	4,350.00
(3)	585819	7/10/25	$10,000.00
(4)	X-612538	3/20/26	5,100.00
(5)	X-624340	6/21/26	2,000.00
(6)	727300	6/27/29	5,000.00
(7)	785675	1/26/31	10,000.00
(8)	904995	7/15/35	6,500.00

That said respondent is also named as the insured in and is the owner and holder of noncancelable income policy number 5510648, dated September 1, 1927, providing for the payment of indemnity of $200.00 per month during the continuance of disability resulting from accidental means or sickness and consisting of a continuous total loss of business time.

That all premiums heretofore coming due on each of said policies have been fully paid, and on July 22, 1936, each of said policies was and still is in full force, virtue and effect.

IX.

That respondent, Jack Paschall, is named as the insured in and is the holder of those certain policies of life insurance issued by respondent, The Pacific Mutual Life Insurance Company of California, a corporation, of the policy numbers and date of issuance and in the amounts as follows:

	Policy Number	Date of Issue	Amount
(1)	309564	3/10/17	$ 8,700.00
(2)	311996	11/29/16	8,700.00
(3)	362350	7/11/19	5,000.00
(4)	370284	11/10/19	2,000.00
(5)	406831	9/28/20	10,000.00
(6)	426027	5/ 3/21	15,000.00
(7)	471373	10/ 6/22	10,000.00
(8)	492507	5/15/23	10,000.00
(9)	505610	7/11/23	20,000.00
(10)	618802	5/21/26	10,000.00
(11)	624632	6/19/26	10,000.00

That said respondent is also named as the insured in and is the owner and holder of noncancelable income policy number 4604603, dated

3805 September 23, 1920, providing for the payment of indemnity of $500.00 per month during the continuance of disability resulting from accidental means or sickness and consisting of a continuous total loss of business time.

That all premiums heretofore coming due on each of said policies have been fully paid, and on July 22, 1936, each of said policies was and still is in full force, virtue and effect.

3806 X.

That respondent, Ralph J. Wetzel, is named as the insured in and is the holder of those certain policies of life insurance issued by respondent, The Pacific Mutual Life Insurance Company of California, a corporation, of the policy numbers and date of issuance, and in the amounts as follows:

3807

	Policy Number	Date of Issue	Amount
(1)	597419	10/30/25	$10,000.00
(2)	620348	6/10/26	10,000.00
(3)	680552	2/ 9/28	10,000.00
(4)	778986	12/13/30	10,000.00

That said respondent is also named as the insured in and is the owner and holder of noncancelable income policies, numbers 5524314 and 5524315, dated January 31, 1929, and July 31,

3808 1929, respectively, providing for the payment of indemnity of $100.00 each per month during the continuance of disability resulting from accidental means or sickness and consisting of a continuous total loss of business time.

That all premiums heretofore coming due on each of said policies have been fully paid, and on July 22, 1936, each of said policies was and still is in full force, virtue and effect.

3809 XI.

That the respondents here appearing are the owners of the issued and outstanding capital stock of the respondent corporation, The Pacific Mutual Life Insurance Company of California, in an amount in excess of 6000 shares.

That the general agents of said respondent corporation, who are members of the intervener, The Pacific Mutual Agency Association, and their subagents are the owners of in excess of
3810 22,000 shares of the issued and outstanding stock of said corporation, and are the holders of 2,227 policies of life insurance issued to them by said respondent corporation, all now in full force and effect, which said 2,227 life policies are in the total or aggregate amount of $10,163,326.00, and are also the holders of 430 non-cancelable income policies issued to them by said respondent corporation, all now in full force and effect, which said 430 non-cancelable income policies

provide a total indemnity of $64,665.00 per month.

XII.

The respondents herein appearing are familiar with the provisions of that certain proposed rehabilitation and reinsurance agreement filed in the court as above entitled, on to wit: the 25th day of September, 1936, copy of which is attached as Exhibit A to that certain petition for approval of rehabilitation and reinsurance agreement filed by the petitioner in the matter as above entitled on or about said 25th day of September, 1936. That said proposed rehabilitation and reinsurance agreement is fair, just and equitable to all policyholders, to all stockholders, to all agents and subagents, and to all creditors of respondent corporation and to all of said interested parties is more fair, just and equitable than any other plan of rehabilitation and reinsurance, of which the respondents herein appearing have received copies.

That said plan of rehabilitation and reinsurance proposed by the petitioner herein under date of, to wit: September 25, 1936, is the result of detailed study and attention on the part of said petitioner and his advisers, legal and actuarial, over a considerable period of time involving the

analysis and examination of other plans of rehabilitation and reinsurance. That said plan so proposed by said petitioner was formulated and agreed upon following extended series of conferences conducted at the instance of the court as above entitled, at which conferences were representatives of holders of all forms of life and accident insurance policies issued by said respondent corporation, and representatives of its stockholders, general agents and creditors.

XIII.

That the delay necessarily incident to formulating another or different plan of rehabilitation or further revising or amending the proposed plan of rehabilitation without first having secured the approval of said plan as now proposed, will cause great and irreparable damage to the estate of the respondent corporation and will greatly hinder and impede the petitioner, as Insurance Commissioner of the state of California, in collecting, conserving or protecting the assets, property and business and conducting the business and affairs of said respondent corporation, and will result in loss of new business and lapsation of active policies, and will result in the loss and disintegration and disorganization of the

3817 agency force of said respondent corporation; and that the failure of this court at this time to promptly approve said plan will cause great loss and irreparable damage to the respondents herein appearing, and to each of them individually, and to each of the members of said The Pacific Mutual Agency Association and to their various subagents, and to other policyholders and stockholders of said respondent corporation.

3818 Wherefore, your respondents pray:

1. That said revised, proposed rehabilitation and reinsurance agreement submitted by the petitioner herein, on to wit: September 25, 1936, be approved in accordance with the prayer of said petition.

2. That all objections to said rehabilitation and reinsurance agreement be overruled.

3819 3. For such other and further relief as to the court shall appear just and equitable in the premises.

COSGROVE & O'NEIL,
Attorneys for Respondents.

Verified.

Endorsed: Filed Oct. 19, 1936. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

3820 In the Superior Court of the state of California in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, v. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404673

Objections of Wm. H. Neblett.

Comes now intervenor, Wm. H. Neblett, by his attorneys, R. Dean Warner and LeRoy B.
3821 Lorenz and in *pro persona*, and shows cause why the plan of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, acting as conservator for Pacific Mutual Life Insurance Company, called a plan of rehabilitation and reinsurance, filed herein September 26, 1936, together with all amendments thereto, should not be adopted.

The whole plan is an attempted reorganization
3822 of the Old Company so as to retain the desirable assets in the same ownership, discharged of all liabilities. The title of the plan is misleading and incorrect in that it is called a rehabilitation and reinsurance. No new capital is proposed to be provided.

1. This intervenor objects to paragraphs 1 to 9 inclusive, and each of them, in the order to show cause filed September 26, 1936, and all amendments thereto, for the reason that the court is without jurisdiction to make any or

3823 either of the proposed orders set out in paragraphs 1 to 9 of the order to show cause, as the court is prohibited from making all and any of such orders by article I, section 13 of the Constitution of the state of California.

2. This intervenor objects to paragraphs 1 to 9 of the order to show cause, and all amendments thereto, on the ground that if the court should adopt all or any of the proposals set forth
3824 in paragraphs 1 to 9 of the order to show cause, it would be a denial of due process of law guaranteed to citizens of the United States by the Fifth and Fourteenth Amendments to the Federal Constitution.

3. That the proposal to make any of the orders in paragraphs 1 to 9 of the order to show cause by the court under authority of the so-called Insurance Code of the state of California
3825 would be void for the reason that the Insurance Code is repugnant both to the state Constitution, article I, section 13, and to the Federal Constitution, the Fifth and the Fourteenth Amendments thereof.

4. That the proposal to make the transfer set out in paragraphs 1 to 9 of the order to show cause, or either of them, are legally fraudulent and void within the meaning of sections 3439 and 3442 of the Civil Code of California.

3826 5. See points and authorities attached hereto and made a part hereof.

R. DEAN WARNER and
LEROY B. LORENZ and
WM. H. NEBLETT,
In Pro Persona,
By LEROY B. LORENZ.

POINTS AND AUTHORITIES.

3827 A law is unconstitutional when it deprives a citizen of his property without due process.

California Constitution, article I, section 13.

No state may pass a law, nor a state court enforce a statute which deprives a citizen of his property without due process of law.

Constitution of the United States, V and XIV Amendments.

3828 To separate the good assets from the bad is a violation of the rule of due process.

C. R. I. & P. Ry. Co. v. Howard, 7 Wall. 392, 19 Law Ed. 117, 121.

A fraudulent transfer within the meaning of the statutes of the state where the transfer is made, although made through the court, is a denial of due process and will be set aside.

Shapiro v. Wilgus, 287 U. S. 348, 77 Law Ed. 355.

3829 The fact that such a transfer is confirmed by the judgment of the court is unavailing.

Bank v. Flershem, 290 U. S. 504, 78 Law Ed. 465.

The transfer proposed here to be made is fraudulent on its face within the meaning of sections 3439 and 3442 of the Civil Code of California.

3830 Reincorporation under the same or a different name and the transfer of the corporate assets from an old company to a new is a fraudulent transfer.

Strahm v. Fraser, 32 Cal. App. 447.

Equity will not permit the owners of one corporation to organize another and transfer from the former to the latter the corporate prop-
3831 erty without first paying the corporate debts. It is not proposed in this plan to pay any debts.

Blanc v. Paymaster Mining Co., 95 Cal. 524.

Transfer of the stock of one corporation to another in exchange for its assets without payment of all debts is one made without consideration and is void.

Kohl v. Lilienthal, 81 Cal. 378.

3832 A fraudulent transfer within the meaning of sections 3439 and 3442 of the Civil Code constitutes a crime in this state.

Penal Code, Sections 154 and 155.

They are likewise condemned by the Federal Courts.

In re Wright Motor Company, (C. C. A.
3833 9), 299 Fed. 106.

In California a corporation is prohibited from a reorganization so that the profitable assets are transferred to the new corporation and allowing the unprofitable ones to die on the hands of the defunct company.

Stanford Hotel Co. v. M. Schwind Co.,
3834 180 Cal. 348.

It is a denial of due process of law under the Federal Constitution and a fraud upon creditors to make a sale as contemplated here from the old company to the new, even though the forms of law are scrupulously observed.

Jackson v. Ludeling, 21 Wall. 616, 22 Law Ed. 492.

3835 Even though a transfer of the kind here had been made and confirmed by the court, the judgment would be set aside in a suit in equity for the legal fraud which appears on the face of the order to show cause and plan filed.

Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547, 556.

3836 Even though the court should make an order approving the plan submitted by inadvertence and mistake, when the legal fraud appearing on the face of the order is discovered, it would set aside the order on its own motion.

In re Garneau, (C. C. A. 7), 127 Fed. 677, 680.

3837 No new capital is subscribed in the plan. The plain object of the plan is to reorganize a new corporation on the wreck of the old and save what may be possible, leaving certain classes of creditors to fight for those assets considered worthless.

If these observations are not correct, then why the proceedings at all? A transfer from one corporation to another in these circumstances is held illegal by the Supreme Court when it said that such a transfer "did not gain validity when he

(the vendor) transferred the business to another with a capacity for obstruction believed to be greater than his own."

Shapiro v. Wilgus, 287 U. S. 348, 77 L. Ed. 355.

That same case also holds that it is unavailing to do the same thing that is being tried here.

"A corporation created three days before the suit for the very purpose of being sued was to be interposed between its author and the creditors pursuing him, with a restraining order of the court to give check to the pursuers."

Shapiro v. Wilgus, 287 U. S. 348, 77 L. Ed. 355.

In Shapiro v. Wilgus the Supreme Court criticized the lower court for approving an illegal plan apparent on the face of the proposal itself. The court said:

"Perceiving that aim and indeed even declaring it, the court did not condemn it, but found it fair and lawful. In this approval of a purpose which has been condemned in Anglo-American law since the Statute of Elizabeth (13 Eliz. chap. 5), there is a misconception of the privileges and liberties vouchsafed to an embarrassed debtor."

3841 The court has found that the company is not insolvent. Reorganization is "the primary relief sought."

"The appointment of the receivers (the conservator here) and the judicial sale were the device employed to effect a transfer of the assets of the existing corporation to a new one, thereby relieving both from the payment of the former's debts."

3842

Bank v. Flershem, 290 U. S. 504, 78 L. Ed. 465, 474.

In Bank v. Flershem it was held that even though the court should approve such a plan, it would still be invalid.

"The fact that the means employed to effect the fraudulent conveyance was the judgment of a court and not a voluntary transfer does not 3843 remove the taint of illegality."

Bank v. Flershem, 290 U. S. 504, 78 L. Ed. 465, 475.

Endorsed: Received copy of the within return this 19 day of Oct., 19..6. U. S. Webb, Atty. Gen.; per John L. Flynn, attorney for.....

Filed Oct. 19, 1936. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

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3844 [TITLE OF COURT AND CAUSE.]

Objections to New Plan of Rehabilitation and Reinsurance of Respondent Company.

Come now Neil S. McCarthy, Ralph R. Huesman, also known as Rahpael Robert Huesman, and Broadtown Investment Company, a corporation, and object to the approval of the rehabilitation and reinsurance agreement as proposed by the Insurance Commissioner of California, and
3845 show to the court as follows:

I.

That at all times herein mentioned the objector Ralph R. Huesman, was and is the owner and holder of the following described policies of insurance issued by the respondent, Pacific Mutual Life Insurance Company of California, a corporation, to-wit:

3846

Policy No.	Date	Amount	Kind
4793463	3/31/1933	Acdt. Death $20,000. Weekly Indemnity $200.	Pacific Leader Accident
261430	10/ 1/1912	$1,000.00 Paid up	20 year Life
2668332	12/31/1919	$200. Mo.	Non-cancellable income, form A-232-Z
2659270	11/21/1919	$300. Mo.	Non-cancellable income, form A-233
2646822	11/17/1919	Acdt. Death $10,000	Life & Limb accident
322932	9/ 1/1917	$ 6,000.	20 yr. endowment
322933	9/ 1/1917	$ 2,000.	20 yr. endowment
361474	7/25/1919	$ 5,000.	20 yr. endowment
362420	7/25/1919	$ 5,000.	20 yr. endowment
493928	4/24/1923	$20,000.	32 yr. endowment
557508	4/24/1924	$ 1,000.	Ordinary life.

II.

That at all times herein mentioned the objector, Broadtown Investment Company, was and now is a corporation duly organized and existing under and by virtue of the laws of the state of California with its principal place of business in the city of Los Angeles, state of California, and that at all of said times was and now is the owner and holder of 216 shares of the common stock of Pacific Mutual Life Insurance Company, and a beneficiary of policies of insurance issued by said respondent, Pacific Mutual Life Insurance Company of California, a corporation, to-wit:

Policy No.	Date	Amount	Kind
411971	11/ 6/1920	$25,000.	Ordinary life
493930	4/24/1923	25,000.	" "
569580	11/ 6/1924	25,000.	" "
771178	9/22/1930	50,000.	" "
771179	9/22/1930	50,000.	" "

III.

That at all times herein mentioned the objector, Neil S. McCarthy, was and is the owner and holder of policy No. 4641696, a non-cancellable income policy, form A-292, issued by respondent.

IV.

That said proposed plan of rehabilitation and reinsurance by the commissioner is against the

3850 best interests of these policy holders and others similarly situated; that said proposed plan does not show upon its face an equitable arrangement, preserving and conserving the contract rights of these policy holders; that said plan directly destroys the force and effect of the obligation and contract heretofore entered into between said respondent and these objectors; that said plan is discriminating against the policy holders such as are held by the above objectors; that said plan
3851 shows that it is for the special benefit of certain stockholders of said old company, and not for the interests of the policy holders of the same. That under said plan the protection and value of objectors' policies of insurance, together with all other policies of insurance issued by the old company, will be greatly lessened and impaired; that objectors allege upon information and belief that the assets of said old company may and can be sold to interested parties without any loss of any
3852 of the rights of any of the stockholders therein interested, and on a plan that will preserve and protect the full contractual rights of these objectors; that the objectors above named, holding the non-cancellable policies are particularly discriminated against, and their rights and obligations thereunder impaired.

V.

That said objectors' rights, as policy holders, are paramount to the claims of stockholders of

3853 said corporation; that the equitable rights of said policy holders, particularly the holders of non-cancellable policies, is of the very highest order for the reason, among others, that the money paid to the respondent under and on such policies was paid pursuant to the highest degree of trust, and that said policy holders have grown older since said contracts were entered into, and their rights and privileges are forever gone, except as defined and granted under said policies.

3854 VI.

Objectors allege upon information and belief that the assets of said respondent company, if properly marshalled and preserved, will be sufficient to carry into effect and abide by the terms of the specific contracts entered into with these objectors.

VII.

Objectors assert that the assets of respondent
3855 company should be marshalled and impounded for the purpose of preserving and protecting objectors' rights and the rights of the creditors of said company. That if said assets are not sufficient, when marshalled and impounded to preserve and protect the contract rights of the policy holders and the creditors, that said company should be liquidated to the end that the policies issued by said respondent company be reinsured under a substantial and financially able company to fully protect their contract rights therein and

3856 to protect in full the creditors rights under said arrangement.

VIII.

That the plan proposed will not maintain the continuity of the policy holders' policies. While it is fair that the business of respondent company should be protected and maintained as a going concern, such status is not of the first or paramount importance; the creditors and policy holders should be protected in full before the
3857 rights of others are considered.

IX.

That the non-cancellable policies now in existence and issued by said respondent company should and must be preserved, and that the plan proposed seeks to cancel or at least partially destroy said non-cancellable policy rights; that the company which proposes to take over the assets of said company is untried, has no material assets, has no substantial capital and no reserve
3858 sufficient to protect the rights of these objectors and other policy holders; that the facts set forth under the petition herein referred to show that said plan is not workable and does not provide a plan which will and can protect the interest of the policy holders. That if upon a hearing it is determined that said respondent is insolvent and cannot be further carried on as a going concern, that your objectors are informed and believe, and upon such information and belief allege, that there are better and more equitable bids for the

3859 assets of said company than that made under the proposed plan, and that said outstanding policies can be reinsured without losses to objectors of any of their rights thereunder. That the proposed plan shows upon its face that it will give to certain parties inequitable advantages over others.

Wherefore, your objectors pray that said petition be declined; that the matter be held in abeyance either in the hands of the present commis-
3860 sioner, or in the hands of one to be selected by the court; that a general scheme of financial responsibility be set up preliminary to any bidder preparing to take over respondent company; that the assets of the company be marshalled and that the same be sold to the highest and best bidder to the end that the policy holders and the creditors, together with all interested parties, may have their rights protected in full, and for whatever other relief the court may deem advisable.

3861 NEIL S. McCARTHY,
By LEROY ANDERSON,
Attorney for Objectors.

Endorsed: Received copy of the within objections this 16th day of October, 1936. U. S. Webb, attorney general, by John L. Flynn, attorney for petitioner.

Filed Oct. 19, 1936, at 9:30 a. m. L. E. Lampton, county clerk; by A. G. Stanham, deputy. D. 11.

3862 [TITLE OF COURT AND CAUSE.]

Amended Complaint in Intervention & Response to Order to Show Cause.

Now come Robert J. Webb and Philip M. Klutznick, by Jacob J. Lieberman and Aaron B. Rosenthal, their attorneys, for themselves and on behalf of all persons, and, in particular, policyholders of respondent herein, The Pacific Mutual Life Insurance Company of California, a corpo-
3863 ration, similarly situated, file this, their amended complaint in intervention herein, by leave of this court, and for intervention and for a first cause therefor, and for a first cause of action, allege as follows:

I.

That, as appears more fully herein, the issues arising hereby raise questions of and are matters of great public interest.

3864 II.

That, except as otherwise set forth herein, at all times mentioned herein:

(a) The Pacific Mutual Life Insurance Company of California was and is a corporation incorporated under the laws of the state of California and has had and still has its principal office and place of business in the city of Los Angeles, county of Los Angeles, state of California; and that, for brevity, said corporation is hereinafter referred to as respondent or as Old Company.

3865 (b) That at all times mentioned herein Samuel L. Carpenter, Jr., was and now is purporting and pretending to act as Insurance Commissioner of the State of California pursuant to the provisions of the Insurance Code of the state of California; and that, for brevity, said person is hereinafter referred to as petitioner.

III.

That at all times mentioned herein said Old Company was authorized to issue, and did issue,
3866 a type of policy of insurance known as noncancellable health and accident policy; that said type of policy has been issued to thousands of persons and that thousands of said policies are still outstanding in the hands of the lawful holders and owners thereof, who have paid all of the premiums required thereunder and otherwise have duly kept and performed all of the provisions and obligations of said policies on their part to be kept and performed; and that hereinafter for brevity such policy or type of policy is
3867 referred to as policy or policies, depending upon the context.

IV.

That said intervening plaintiff Philip M. Klutznick, at all times mentioned herein, was and still is the holder and owner of such a policy, same bearing No. 5614191; and that at all times mentioned herein the said intervening plaintiff Robert J. Webb was and still is the holder and

owner of such a policy, same bearing No. 5607473; and that each of said intervening plaintiffs has paid all of the premiums required under the terms and provisions of said policy, and otherwise has duly kept and performed all of the provisions and obligations thereof on his part to be kept and performed.

V.

That heretofore, to-wit, on or about the 22nd day of July, 1936, the above-entitled action or proceeding was commenced in the above-entitled court by said Samuel L. Carpenter, Jr., purporting and pretending to act as Insurance Commissioner of the State of California, as petitioner, against The Pacific Mutual Life Insurance Company of California, a corporation, as respondent, with the knowledge and consent of said respondent, for the purpose of having petitioner authorized, pursuant to certain provisions of the Insurance Code of the state of California, to be appointed conservator of respondent, to work out a rehabilitation and/or reinsurance plan or agreement concerning said respondent, and, if that should prove to be impracticable, then to wind up and liquidate said respondent.

VI.

That thereafter and prior to the filing of this complaint in intervention this court, with the knowledge and consent of said respondent, made certain orders and entered certain judgments and

decrees herein, to-wit: an order, judgment and decree made and entered herein on the 22nd day of July, 1936, appointing said petitioner as conservator of said Old Company, and that certain order, judgment and decree made and entered herein on the 11th day of August, 1936, ratifying, approving and confirming said order and appointment, and re-appointing said petitioner as such conservator, and that certain order, judgment and decree made and entered herein on the 17th day of August, 1936, ratifying, confirming and approving a certain order permitting the performance of acts and the making of payments alleged to be necessary to conserve and protect assets of said Old Company and to prevent the waste thereof; all of which appear more fully in the pleadings, records, files, minutes, orders, judgments, decrees and proceedings herein (which said pleadings, records, files, minutes, orders, judgments, decrees and proceedings are hereby incorporated herein in their entirety by reference thereto the same as though set forth herein *in haec verba*).

VII.

That each of the intervening plaintiffs herein, including in and by such designation all persons similarly situated to said plaintiffs, is a holder of such a policy, as same is more particularly described in paragraph III hereof.

3874 VIII.

That pursuant to the alleged and purported authority of the orders, judgments and decrees mentioned and described in paragraph VI hereof, said petitioner has proposed a so-called rehabilitation and reinsurance agreement (hereinafter referred to as agreement), purporting to be an agreement made and entered into as of the 22nd day of July, 1936, between Pacific Mutual Life

therein called New Company,
3875 Insurance Company, a California corporation, and Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as conservator of The Pacific Mutual Life Insurance Company of California, a California corporation, a copy of which agreement has heretofore been filed and made a part of the records, files, minutes, pleadings and proceedings hereof, and the terms and provisions of which are hereby incor-

by reference
3876 porated herein in full as though set forth *in haec varba;* that in connection with the making and filing of said agreement, said petitioner has petitioned this court for the approval of same, and this court has made and entered its order to show cause, requiring all persons interested, or claiming to be interested, herein, either as policyholders or stockholders of respondent herein, to be and appear before this court, at the hour of 10 o'clock A. M., on October 19, 1936, in the court room of Department 11, on the 12th floor

of the City Hall, in the city of Los Angeles, state of California, and show cause, as is more particularly set forth in said order to show cause; that if the said agreement is authorized and approved by this court and same is consummated and the assets of said Old Company are sold pursuant thereto, to the corporation described in said agreement as the New Company, the said Old Company will be left without assets and means of paying any of said policies as same mature, according to the terms and provisions thereof, and from continuing same in full force and effect, or at all, and that said New Company will re-insure said policies only upon condition that the holders thereof, intervening plaintiffs among them, submit to a drastic, unwarranted and illegal reduction in the benefits payable thereunder, as same appears more fully from said agreement; and that, unless this court refuses to approve said agreement, said Old Company will be unable to keep said policies in full force and effect, or at all, according to the terms and provisions thereof.

IX.

Intervening plaintiffs allege, on information and belief, that a large number of holders of said policies are, by reason of age and physical disability or handicap, unable now or hereafter to obtain from other insurance companies a type of insurance similar to that offered in and afforded

3880 by said policies, and that still other holders of said policies, in large numbers, are unable to pay for a type of insurance similar to that offered in and afforded by said policies, owing to the fact that other insurance companies issuing similar policies exact a much higher premium therefor than does said Old Company for said policy.

X.

That, by reason of the premises above set
3881 forth, intervening plaintiffs and all others similarly situated have no speedy and adequate remedy at law; and that, unless said Old Company is restored to a position where it can continue said policies, as set forth in paragraph VIII hereof, intervening plaintiffs and all others similarly situated will suffer irreparable damage and harm.

XI.

That the approval of said agreement is beyond the authority and jurisdiction of this court and,
3882 if given, would be void and of no force and effect, for the reason that authority therefor is not given in, and, in fact, is forbidden by, the terms and provisions of said Insurance Code of California, and, in particular, of articles *is* and 14 of chapter 1 of part 2 of division 1 thereof.

XII.

That the acts of petitioner and of said Old Company, as herein set forth, and the negotiation of said agreement by the parties thereto, were done for the sole purpose of effecting a means or

3883 method by which said policies could and would be cancelled, and intervening plaintiffs and others similarly situated would be deprived of the benefits thereof.

XIII.

That said policies have been issued to and are held by thousands of persons living throughout the world, and that their rights therein, and the degree and extent to which said persons are affected by the facts and circumstances set forth
3884 herein, raise questions and are matters of great public interest.

For a further and second cause for intervention and second cause of action, intervening plaintiffs repeat and incorporate herein by reference, with the same force and effect as though set forth *in haec verba*, the whole of their first cause for intervention and first cause of action, and further allege:

3885 I.

That if the Insurance Code of the state of California and, in particular, division 3, and articles 13 and 14 of chapter 1 of part 2 of division 1 thereof, authorize, or shall be construed or deemed to authorize, the acts, orders, judgments and decrees of this court and/or the acts of said petitioner and/or the acts of said Old Company and/or the approval and ratification of said agreement by this court, then said Insurance Code, and, in particular, the portions thereof

3886 specifically referred to, are illegal, null and void, and of no force and effect, in that each of them is in conflict with and is contrary to, and is forbidden by, the following provisions of the Constitution of the state of California, to-wit:

(a) Sections 7, 11, 13, 16, 21 and 22 of article I thereof;

(b) Section 1 of article III thereof;

(c) Sections 24 and 25 of article IV thereof;

3887 (d) Section 1 of article XII thereof.

For a further and third cause for intervention and third cause of action, intervening plaintiffs repeat and incorporate herein by reference, with the same force and effect as though set forth *in haec verba,* the whole of their first cause for intervention and first cause of action, and further allege:

I.

3888 That if the Insurance Code of the state of California and, in particular, division 3, and articles 13 and 14 of chapter 1 of part 2 of division 1 thereof, authorize, or shall be construed or deemed to authorize, the acts, orders, judgments and decrees of this court and/or the acts of said petitioner and/or the acts of said Old Company and/or the approval and ratification of said agreement by this court, then said Insurance Code, and, in particular, the portions thereof specifically referred to, are illegal, null and void, and

3889 of no force or effect, in that said Insurance Code and, in particular, the said portions thereof, are in conflict with and each of them is contrary to, and is forbidden by, section 1 of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, intervening plaintiffs demand judgment as follows:

1. Denying the authority and approval of this
3890 court to the agreement more particularly described as proposed rehabilitation and reinsurance agreement, mentioned and described in paragraph VIII of the first cause of action hereof.

2. For such other and further order, judgment, decree and relief as shall be just, equitable or necessary in the premises.

JACOB J. LIEBERMAN and
AARON B. ROSENTHAL,
By AARON B. ROSENTHAL,
3891 *Attorneys for Intervening Plaintiffs.*

Verified.

Endorsed: Received copy of the within complaint this 19 day of Oct., 1936. U. S. Webb, attorney general, by John L. Flynn, attorney for

.....

Filed Oct. 19, 1936. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

3892 [TITLE OF COURT AND CAUSE.]

Return of: David Lynn Openshaw, Rulon Wall Openshaw, Nod I. Mulville, Gilbert Knudtson, Reuel Leslie Olson, and Delvy Thomas Walton to Order to Show Cause Re Rehabilitation and Reinsurance Agreement.

Come now David Lynn Openshaw, Rulon Wall Openshaw, Nod I. Mulville, Gilbert Knudtson,
3893 Reuel Leslie Olson and Delvy Thomas Walton as objecting parties in the above entitled proceeding, and in answer to the petition on file herein, dated September 25, 1936, seeking approval of the rehabilitation and reinsurance agreement of the Insurance Commissioner as therein set forth, and by way of reply and return to the order to show cause issued out of this court on September 25, 1936, respectfully show:

I.

3894 That these objecting parties are now, and from the dates hereinafter specified have been, the owners and holders of non-cancellable income policies in the respondent company, The Pacific Mutual Life Insurance Company of California, as follows:

1. Said David Lynn Openshaw made application for and had issued to him by respondent company on August 21, 1929, policy No. 5602549, designated as a non-cancellable income policy in-

suring against disability upon the life of said insured, being form No. A383, and renewable to age sixty (60), and for which he paid the annual premium at the time of issuance thereof of one hundred forty dollars ($140.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

2. Said Rulon Wall Openshaw made application for and had issued to him by respondent company on August 31, 1931, policy No. 5623536, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A754, and renewable to age of sixty (60), and for which he paid the annual premium at the time of issuance thereof of eighty four dollars ($84.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

3. Said Nod I. Mulville made application for and had issued to him by respondent company on March 11, 1931, policy No. 5605206, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A383, and renewable to age of

sixty (60), and for which he paid the annual premium at the time of issuance thereof of seventy three dollars ($73.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

4. Said Gilbert Knudtson made application for and had issued to him by respondent company on January 15, 1920, policy No. 2668398, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. 232Z, and renewable to age sixty (60); and for which he paid the annual premium at the time of issuance thereof of fifty dollars ($50.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

5. Said Reuel Leslie Olson made application for and had issued to him by respondent company on October 3, 1928, policy No. 5518154, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A383, and renewable to age sixty (60), and for which he paid the annual premium at the time of issuance thereof of forty

3901 one dollars twenty-five cents ($41.25), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

6. Said Reuel Leslie Olson further made application for and had issued to him by respondent company on February 13, 1928, policy No. 5524946, designated as a non-cancellable income
3902 policy insuring against disability upon the life of said insured, being form No. A383, and renewable to age sixty (60), and for which he paid the annual premium at the time of issuance thereof of fifty seven dollars seventy-five cents ($57.75), to February 13, 1934, at which time said premium was reduced to twenty four dollars seventy-five cents ($24.75), and paid at said reduced rate up to the present time, and said policy of insurance is now in full force and effect; that
3903 no claim has heretofore been made on the basis of such contract of insurance.

7. Said Delvy Thomas Walton made application for and had issued to him by respondent company on September 1, 1930, policy No. 5609874, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A383, and renewable to age sixty (60); and for which he paid the annual premium at the time of issuance thereof

3904 of eighty two dollars ($82.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

8. Said Delvy Thomas Walton further made application for and had issued to him by respondent company on September 1, 1933, pol-
3905 icy No. 5635474, designated as a non-cancellable income policy insuring against disability upon the life of said insured, being form No. A776, and renewable to age fifty five (55), and for which he paid the annual premium at the time of issuance thereof of fifty nine dollars ($59.00), and has paid the said annual premium during each successive year thereafter, up to the present time, and said policy of insurance
3906 is now in full force and effect; that no claim has heretofore been made on the basis of such contract of insurance.

II.

That each of the objecting parties hereto are young men, and entered into the contract of insurance against disability with the respondent company, The Pacific Mutual Life Insurance Company of California, in good faith and in

the prime of youth, seeking protection against any such contingencies as might occur through disability and for protection in their respective professions as contemplated under the terms of said policies above, and in strict reliance upon the representations of the duly authorized representatives and agents of said respondent company as to its honesty, fidelity, and standing in the insurance field and among major insurance companies.

III.

That your petitioner herein, the Insurance Commissioner in the formulation and preparation of the rehabilitation and reinsurance plan and agreement concerning respondent corporation, should provide for the equal protection of the rights of the objecting parties hereto under their respective non-cancellable income policies, along with and equal to any other rights of contract holders of insurance, made, issued, and outstanding by the respondent corporation; that the Insurance Commissioner is without authority to prefer one class of policyholder over another class, or to claim that certain reserves are applicable to one type of policy, and that other, lesser or no reserves are available for the protection of the class known as non-cancellable in-

come policyholders; that to attempt any such classification would unfairly discriminate against the accrued and vested rights of these objecting parties and materially and adversely affect their said interests.

IV.

That the court is without power to authorize the Insurance Commissioner and petitioner herein to prefer the holders of life insurance or other policies issued by respondent corporation over these holders of non-cancellable income policies in said respondent corporation, and that authority extended to said Insurance Commissioner should recognize the equal rights under the law of all policyholders as a single class or group, so far as the said contract rights or vested interests have accrued thereunder, and as pertain to the existing assets and reserves of said respondent corporation; that any attempt by which the rights and interests of these non-cancellable policyholders are attempted to be subordinated or subjected to prior rights of any other class of policyholder in and to its assets and reserves are without the power and authority of this court, or the Insurance Commissioner acting thereunder, and should receive judicial denunciation as an attempt to discriminate un-

fairly against this particular class of policy-holder.

V.

That the assets and reserves of respondent corporation should be held by petitioner as conservator, and should not be sold or transferred to any other person, firm, or corporation, unless and until such disposition thereof may be had on a fair and equitable basis, consistent with the value thereof; that the proceeds therefrom be held and applied in equal share and interest among all policyholders of whatsoever class, character, or nature, of respondent corporation, so as to afford these objecting parties the value of their interests in said assets and fair and equitable protection under the contracts hereinabove set forth and presently existing between them and respondent corporation, and for which premiums have been exacted by the latter from year to year.

VI.

That any plan or agreement of respondent corporation should not be approved by this court unless it offers a reasonable prospect for successful rehabilitation of the debtor corporation, and provides for distribution of available assets according to the respective claims represented by

3916 policies of insurance now in force of all parties, or which may be filed in the future, and further provides an alternative for cash reimbursement of premiums paid after allowing a reasonable sum for past protection under such non-cancellable policies on a fair actuarial basis.

VII.

That these objecting parties be permitted to file in this proceeding, their claims for back pre-
3917 miums paid to the date hereof, and that the last premium payments made be held by petitioner, the Insurance Commissioner, intact, and such unused portion thereof returned to them upon determination of their rights and interests under policies herein set forth, and in and to the assets and reserves of the respondent corporation.

Wherefore, these objecting parties pray:

3918 (a) That this court consider the fairness and justness of any plan of rehabilitation submitted, and carefully scrutinize any proposed sale or transfer of the assets of respondent corporation;

(b) That the rights of these objecting parties as non-c*na*cellable income policyholders be adjudged to be vested rights, and to be entitled to equal protection in the reserves of respondent

corporation, along with all other policyholders thereof;

(c) For the protection of the rights and interests of said policyholders in and to the assets of said respondent corporation, and their application in equal share to the claims herein asserted, or which may in the future be filed, and

(d) For such other and further relief as to the court may seem just and equitable in the premises.

DAVID LYNN OPENSHAW,
RULON WALL OPENSHAW,
NOD F. MULVILLE,
GILBERT KNUDTSON,
REUEL LESLIE OLSON,
DELVY THOMAS WALTON,
By: DELVY T. WALTON,
Attorney for Objecting Parties.

Verified.

Endorsed: Received copy of the within this 17 day of October, 1936. John L. Flynn, attorney for Attorney General; Mitchell, Silberberg & Knupp, by Peery Price, atty. for plff.

Filed Oct. 19, 1936. L. E. Lampton, county clerk; R. J. Curtis, deputy.

3922 [TITLE OF COURT AND CAUSE.]

Response of R. Rabinowitz to Order to Show Cause With Respect to Rehabilitation and Reinsurance, and Objections to Confirmation of Rehabilitation and Reinsurance Agreement.

Comes now R. Rabinowitz, and by way of response to that order to show cause with respect to rehabilitation and reinsurance, dated Septem-
3923 ber 25, 1936, does object to the ratification, confirmation or approval of said rehabilitation and reinsurance agreement described in said order to show cause. As grounds therefor your objector avers:

I.

That this objector is and at all times herein mentioned has been the holder and owner of the following policies of health, accident and disabil-
3924 ity insurance heretofore issued by respondent herein, to-wit:

1. Policy No. 4641785 (Noncancellable Disability Policy) issued September 14, 1923.

2. Policy No. 4643430 (Noncancellable Disability Policy) issued November 19, 1923.

3. Policy No. 4670940 (Noncancellable Disability Policy) issued July 8, 1926.

4. Policy No. 384061 (Life Insurance with disability provisions) issued March 26, 1928.

II.

3925 That on July 22, 1936, each of the said policies of insurance hereinabove described was in good standing.

III.

That prior to July 22, 1936, this objector did become ill and disabled, at all times since has been and is now ill and disabled.

IV.

3926 That paragraph (13) of said rehabilitation and reinsurance agreement referred to in said order to show cause provides:

(13) The New Company shall be obligated to pay all disability benefits under Non-Can Policies for disabilities commencing prior to the effective date of this agreement with respect to which claims or notices of claims were duly filed in accordance with the terms of such policies, and in any event not later than twenty (20) days
3927 after the effective date of this agreement, and all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to the terms of any such settlement agreements; and subject, further, to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the

3928 Old Company or to the Conservator as aforesaid had this agreement not been made.

V.

That by use of the language "in accordance with the terms of such policies" in said paragraph (13), which language appears in line 21, on page 17 of said rehabilitation and reinsurance agreement, said agreement may:

(a) Exclude any obligation to pay benefits
3929 unless claims or notices of claims were filed strictly in accordance with the policy terms; and hence

(b) Exclude any obligation to pay benefits where there exists a waiver of notice or claim or waiver of technical defenses, or there exist equitable grounds excusing strict compliance with the policy terms; and

(c) Preclude the waiver of technical defenses and compel the New Company in all cases
3930 to assert technical defenses irrespective of the merits of the claim; and

(d) Deprive claimants of the right to assert estoppel against technical defenses where improper action on the part of the Company otherwise would entitle the assertion of estoppel; and

(e) Deprive the New Company of all liberty of action to waive technical defects in otherwise valid claims, or to recognize bona fide claims on their merits, irrespective of technical defects.

3931 VI.

That such results are harsh, unjust, unfair, discriminatory and inequitable. That the New Company should have full liberty of action to recognize bona fide claims on their merits irrespective of technical defects.

That the litigation and uncertainty which has involved the Old Company and the New Company since July 22, 1936, have discouraged and
3932 prevented the filing of notices and claims with due compliance with policy terms.

That the insistance and requirement by the officers and agents of the two companies and by the Commissioner after July 22, 1936, and for a period of more than twenty (20) days thereafter, that claimants irrevocably elect in writing to accept the earlier rehabilitation agreement
3933 (which has never been approved by the court) in order that their claims or notices might be received, has discouraged and prevented the filing of notices or claims with due compliance with policy terms. That claimants should be excused from default and delay, and from technical defects in filing notices in such cases, otherwise the benefit of paragraph (13) is rendered illusory.

That said paragraph (13) in its present form renders illusory the benefits intended thereby in all cases where claims or notices of claims were not actually filed before July 22, 1936, even though disability occurred prior thereto. That this results from the fact that the earlier rehabilitation agreement (which has never been approved by the court) in paragraph (10) thereof excluded all claims for disability occurring prior to July 22, 1936, unless claims or notices of claims had been filed prior to July 22, 1936. That policy holders were misled thereby and caused to believe that subsequent filing of claims or notices of claims would be futile and were thereby induced not to file in accordance with the terms of the policies and not to file after July 22, 1936. That claimants should not be prevented from raising an estoppel against the Company in such cases.

VII.

That the requirement of said paragraph (13) for due filing in accordance with the terms of the policies is unnecessary to the protection of the New Company. Said New Company is amply protected by the subsequent language of said paragraph providing that the obligation of the

3937 New Company is "subject to all of the terms and provisions of such Non-Can Policies", and also "subject, further, to any and all defenses, offsets, counterclaims, cross-complaints and rescission rights against any such claim or claims which would have been available to the Old Company or to the Conservator".

VIII.

3938 That paragraph (13) of said rehabilitation and reinsurance agreement referred to in said order to show cause should be modified by striking from lines 20 and 21 on page 17 the words "were duly filed in accordance with the terms of such policies, and in any event", and by inserting in lieu thereof the words "are filed" so that said paragraph will then read as follows:

3939 (13) The New Company shall be obligated to pay all disability benefits under Non-Can Policies for disabilities commencing prior to the effective date of this agreement with respect to which claims or notices of claims are filed not later than twenty (20) days after the effective date of this agreement, and all payments under settlement agreements made by the Old Company with claimants under such policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such

Non-Can Policies, and subject to the terms of any such settlement agreements; and subject, further, to any and all defenses, offsets, counterclaims, cross-compiaints, and rescission rights against any such claim or claims, which would have been available to the Old Company or to the Conservator as aforesaid had this agreement not been made.

Wherefore your objector prays that this court make its order disapproving paragraph (13) of said rehabilitation and reinsurance agreement referred to in said order to show cause and requiring that said paragraph (13) be revised and modified as set forth in paragraph VIII supra of this response.

R. RABINOWITZ,
By LAWLER & FELIX,
His Attorneys.

Verified.

Endorsed: Received copy of the within response this.....day of....., 19..... U. S. Webb, attorney general, Mitchell, Silberberg & Knupp, by John L. Flynn, attorneys for petitioner.

Filed Oct. 19, 1936. L. E. Lampton, county clerk; by R. J. Curtis, deputy.

3943 [TITLE OF COURT AND CAUSE.]

Objections to Plan.

Leave of intervention having first been granted William A. Sullivan, as Insurance Commissioner of the state of Washington, the above named intervenor respectfully alleges:

I.

That he now is and for more than three years
3944 last past has been the duly elected, qualified and acting Insurance Commissioner for the state of Washington. That he is a member of the National Convention of Insurance Commissioners and is a former president of said convention.

II.

That the above named respondent is and for many years has been engaged in the insurance
3945 business in the state of Washington. That it has numerous policyholders and a large amount of property within said state, all under the jurisdiction and supervision of your intervenor by virtue of his office.

III.

That for many months last past this intervenor, in association with the Insurance Commissioners of California and other states, has been

3946 active in supervising, investigating and examining the affairs of the above named respondent.

IV.

That this intervenor in association with Insurance Commissioners of other states has heretofore expressed approval of the plan of rehabilitation and reinsurance presented by the Hon. Samuel L. Carpenter, Jr., Insurance Com-
3947 missioner of the state of California, and now under consideration by this court. At the time said plan was formulated it was recognized that some plan must immediately be worked out if the good will and values of the above named respondent were to be retained. That said plan, in the opinion of this intervenor, was the best plan that could be formulated at that time, and gave promise, in the absence of any better plan,
3948 to work out the problems of respondent in a way as to avoid the necessity of liquidation. However, it was recognized then by all concerned, and especially by this intervenor, that the interests of policyholders of respondent could best be protected by the introduction of new money into the capital structu e of respondent. It was apparent that one class of policyholders, namely, those holding noncancellable accident and health policies, would be compelled to accept drastic re-

3949 ductions in beneficial payments, and the interest of this intervenor was and still is to be assured that such reductions should not be greater than was absolutely necessary, and that full beneficial payments under said noncancellable policies should be restored at the earliest possible time.

A proposal has recently been filed in this proceeding which if given effect would provide
3950 sorely needed additional capital, and which would increase the present beneficial payments to the noncancellable policyholders as much as 150% above the payments proposed in the plan now under consideration, and which gives promise, in the opinion of this intervenor, to restore full beneficial payments to such policyholders with more speed and certainty than the Commis-
3951 sioner's plan.

This intervenor considers it to be his duty to insist upon every possible protection to policyholders, and to be certain that the reserves behind their policies shall be restored as quickly as possible. The plan now under consideration does not provide for any additional capital, whereas added capital is the thing that is needed.

3952 Wherefore, this intervenor respectfully objects to the plan now under consideration on the ground that it is now possible to present another plan which would:

a. Furnish additional capital;

b. Increase beneficial payments to noncancellable policyholders;

c. Give promise of restoring the full rights
3953 to such policyholders sooner and more certainly than the proposed plan;

d. Be more advantageous to policyholders of all classes.

IVAN MERRICK,
Attorney for Intervenor.
639 Rosslyn Hotel, L. A.

3954

Verified.

Endorsed: Received copy of within objections this 20th day of Oct., 1936. U. S. Webb, Atty. Gen.; by John L. Flynn.

Filed Oct. 20, 1936, 2:29 p. m. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

3955 [TITLE OF COURT AND CAUSE.]

Proposal to Reinsure the Business of The Pacific Mutual Life Insurance Company of California as Modified to Conform With Proposed Amendments.

The plan hereinafter outlined contemplates the organization of two corporations under the laws of the state of California. Said companies will be appropriately named, each will be under
3956 separate and independent management, and will be referred to herein as the "Life Company" and the "Accident Company". The Transamerica group, of which the Occidental Life Insurance Company is a part, will pay to said corporations an aggregate of $12,108,200.00. The Accident Company will receive a portion of the profits of the Life Company.

The Pacific Mutual Life Insurance Company of California will be hereinafter designated as
3957 "Pacific Mutual". Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as Conservator of the Pacific Mutual Life Insurance Company of California, will be hereinafter referred to as "Conservator". The Superior Court of the state of California in and for the county of Los Angeles will be hereinafter referred to as "the Court". Non-cancellable Income Policies will be hereinafter referred to as "Non-Can policies". The term "Commis-

sioner" shall mean the present Insurance Commissioner of the state of California or his successor in office.

THE LIFE COMPANY

1. The Life Company shall have a capital of $1,000,000, together with a surplus of $2,000,000, said amounts aggregating $3,000,000, to be paid into the company by the Transamerica group.

2. The Life Company will reinsure and assume the liabilities of the Pacific Mutual under all policies and contracts of insurance, except Non-Can policies, issued or assumed by the Pacific Mutual and outstanding and in force on July 22, 1936, or issued by the Conservator, subject, however, to any and all offsets, rights and defenses then or thereafter existing against said policies or contracts of insurance which would have been available to the Pacific Mutual or the Conservator. Liabilities under Non-Can policies are expressly excluded from the obligations assumed by the Life Company.

3. (a) The Life Company will agree to reinsure and assume, upon the terms and conditions hereinafter set forth, all policies other than Non-Can policies, which have lapsed, upon the reinstatement thereof in accordance with the terms and conditions of each such policy.

(b) The foregoing paragraph (a) is modified to the extent that any policy, other than a Non-Can policy, lapsed since July 22, 1936, will be reinstated during the lifetime of the insured, provided the insured is not in such condition as to be eligible for benefits under his policy, without evidence of insurability, on written application therefor by the insured and payment of all premiums in arrears, if such application is made and premiums are paid within seventy-five (75) days after the approval by the Court of the reinsurance agreement contemplated by this proposal.

(c) Upon reinstatement of a lapsed policy it shall for all purposes be treated (but only from and after the date of reinstatement) the same as if it had been in force on the effective date of the reinsurance agreement contemplated herein, and shall be subject to the terms and conditions of said agreement.

4. The Life Company will pay in full all valid unpaid claims under policies issued or assumed by the Pacific Mutual, other than Non-Can policies, and all claims arising under the policies reinsured by it, and all liabilities which are incident to such policies, subject, however, to any and all defenses, offsets or counterclaims which would have been available to the Pacific Mutual or to the Conservator.

5. (a) The Conservator shall sell, assign, convey and transfer, or cause to be sold, assigned, conveyed and transferred to the Life Company, vesting title thereto in the Life Company free and clear of encumbrances, tax or other liens or adverse claims, Pacific Mutual assets equal in value to the aggregate sum of the legal reserves required for the policies and contracts reinsured by the Life Company and such other liabilities assumed by the Life Company in its reinsurance agreement.

(b) All of the Pacific Mutual assets to be acquired by the Life Company, as hereinabove set forth, shall be taken at the aggregate values as shown in the financial statement of the Pacific Mutual Life Insurance Company as of July 22, 1936 (subject to appropriate adjustments for assets acquired or disposed of in the course of business transactions occurring since said date to the date of execution of the contract of reinsurance) provided the court shall find and decree that said values represent the fair value of said assets.

(c) The amount of the reserves required for the business reinsured and the aggregate value of the assets to be acquired by the Life Company shall be fixed and determined as of the effective date of the contemplated reinsurance agreement, and the assets shall be taken at the value determined according to the provisions of 5:(b) above.

(d) On the assumption that the amount of the required reserves and the value of assets will be approximately the same on the effective date of the proposed reinsurance agreement as the asset values and reserves set forth in said financial statement as of July 22, 1936, the exhibits introduced in the pending proceedings and marked Exhibits G-1, G-3 and G-4, will reflect the approximate amount of assets to be acquired, the approximate amount of required reserves, the approximate amount of liabilities to be assumed, and the capital structure of the Life Company.

6. The Life Company will engage in a general life, accident and health insurance business and will segregate its business by establishing three departments, namely:

(1) Participating Life Insurance Department;

(2) Non-Participating Life Insurance Department; and

(3) General Accident and Health Insurance Department.

To each department will be allocated a portion of the Pacific Mutual assets acquired by the Life Company equal in value to the amount of reserves and liabilities of such department. The selection of assets allocated to each department shall be made by the Conservator and approved by the Transamerica group.

3970 7. The Life Company will assume no claims or liabilities of any kind or nature against the Pacific Mutual or the Conservator other than those hereinabove set forth. The Life Company will pay to the Conservator such amount of money, if any, hereafter paid by the Conservator in satisfaction of claims filed by dissenting holders of policies reinsured under the terms of this proposal and allowed by the Court. There shall be no moratorium on policy loans or sur-
3971 renders for cash value.

8. Representation on the Board of Directors of the Life Company will be offered to interested groups of policyholders and agents; and in the conduct of its business the Life Company will retain all satisfactory employees of the Pacific Mutual.

9. The Life Company will enter into equitable agency agreements with such agents of the Pacific Mutual as desire to become associated
3972 with the Life Company, and so long as any such agent remains in the service of the Life Company, renewal commissions will be paid such agent on policies written by him for the Pacific Mutual and reinsured by the Life Company, in accordance with the terms and provisions of his Pacific Mutual agency contract covering such business. In computing commissions under Pacific Mutual agency contracts policies reinsured by the Life Company shall be considered a con-

3973 tinuation of existing policies and not the writing of new business.

10. The Life Company will pay to the Accident Company fifty per cent (50%) of the net profits of the business of its Accident Department, payments to be made in annual installments, subject to the terms and conditions and termination of such payments, as hereinafter set forth.

3974 THE ACCIDENT COMPANY

11. The capital stock of the Accident Company will consist of 254,100 shares of Class A common stock and 254,100 shares of Class B common stock. All of said stock shall be of the par value of $1.00 per share and shall have the same voting and dividend rights. The Transamerica group will pay $508,200 for said stock, totaling 508,200 shares. Class A common stock 3975 shall be callable at any time within ten (10) years at $30 per share. In the event of liquidation of the Accident Company after restoration and restitution of full benefits and agents' commissions, Class A stock shall participate in the distribution of assets to the extent of $10 per share, after which the Class B stock shall participate in such distribution of assets to the extent of $10 per share, and thereafter both classes of stock shall participate equally in any distribution of assets.

3976 The Class A stock of the Accident Company shall either be delivered immediately to the stockholders of Pacific Mutual, or upon the order of the Court, be impounded with the Insurance Commissioner until there shall have been full and complete restoration of benefits under Non-Can policies, full restitution in deficiencies in benefit payments to Non-Can policyholders, and full restoration and restitution to agents on account of commissions relating to Non-Can poli-
3977 cies, or upon such other terms and conditions as may be set forth in said order of the Court.

12. In addition to the payment of $508,200 as set forth in the preceding paragraph, the Transamerica group will pay to the Accident Company $1,100,000 and will make further payments to the Accident Company of a sum of $7,500,000, payable in installments at the rate of $500,000 per year.

For the purpose of providing additional initial
3978 surplus of the Accident Company, the Transamerica group will immediately collateralize the first annual payment in the sum of $500,000 so as to qualify the sum so collateralized as a present admissible asset of the Accident Company to bear interest at the rate of 4¼%, and agrees to likewise collateralize and qualify the second annual payment of $500,000, if necessary, to cover and pay any expenses or losses of the Accident Company which cannot be defrayed out of the Accident Company's available surplus.

3979 The Transamerica group reserves the right to make payment at any time prior to the expiration of said fifteen year period of all or any part of the unpaid amount of said sum of $7,500,000.

13. (a) The Accident Company will assume and reinsure liabilities of the Pacific Mutual and the Conservator under all Non-Can Accident and Health policies issued by the Pacific Mutual and in force on the effective date of the agreement contemplated by this proposal, sub-
3980 ject to the policy terms and conditions and also to the terms, conditions and limitations, and only to the extent, hereinafter specifically provided, and subject also to any and all claims, defenses, actions and rights in connection therewith, which would have been available to the Pacific Mutual or the Conservator.

(b) The Accident Company will pay, without deduction, every valid claim for disability benefits under any such policy for disability aris-
3981 ing prior to July 22, 1936, with respect to which claim or notice of claim was duly filed in accordance with the terms of the policy on or before August 12, 1936, and will likewise pay all liabilities, without deduction, under settlement agreements made by the Pacific Mutual with claimants under any such policy. All such claims are subject, however, to all defenses and rights which would have been available to the Pacific Mutual or to the Conservator.

3982 (c) As to all other claims for disability benefits under Non-Can policies, now pending or hereafter arising, the Accident Company's liability in any such case shall be limited to the percentages of the monthly disability benefits set forth in the following schedule:

Prem. Class	Issued Under Rate Books	Policy Forms	Issued Under Policy No.	Percentage of Original Monthly Benefit Assumed New Company
3983				
1918	A1445-A1445Z A1445Y-A1445X A1445W	A231 to A288, inc.	2658601 to 2698150 4600501 to 4628000 4711101 to 4712600 4730901 to 4731100	50%
1921	A1687-A1687Z A1687Y-A1687X A1687W	A291 to A294, inc. A365-A366	4628001 to 4700000	59%
1926	A1958-A1958Z	A382-A383 A386-A387 A387Z	5500001 to 5600000	65%
3984 1929	A2293	A382-A383 A386-A387 A387Z	5600001 to 5620000	72%
1931	A2367	A753 to A756, inc. A763-A764	5620001 to 5635000	78%
1932	A2432-A2432Z A2499	A775 to A780, inc.	5635001 to 6000000	93%
	A2499	Aggregate A1216 to A1221, inc.	6500001 to 7000000	93%
1935	A2567	Aggregate A1226 to A1229, inc.	7000001 to 7100000	93%

3985 Benefits under all such policies shall be reduced to the extent indicated in the foregoing schedule but shall be subject to restoration of monthly benefits and restitution of deficiencies in installments previously paid as hereinafter provided.

(d) Notwithstanding the reduction in benefits and the limitation of the obligation of the Accident Company to make monthly disability payments, as set forth in the preceding paragraph, each holder of any such policy, to be en-
3986 titled to the benefit of the proposed reinsurance agreement, shall be obligated to continue payment of premiums in the amount stipulated in his policy.

14. (a) At the end of five (5) years from the effective date of the contemplated reinsurance agreement, or at such earlier date as may be fixed by the Commissioner, the reserve requirements shall be recomputed and if reserves and funds available for reserves are then suffi-
3987 cient to justify an increase in the schedule of benefits set forth in paragraph 13 (c) hereof, benefit payments on claims then in force at reduced rates and benefits on future claims will be increased to a rate approved by the Commissioner. Thereafter redetermination of reserve requirements and available reserves for the purpose of adjusting benefit rates shall be made from time to time upon request of the Accident Company or the Commissioner, to the end that

full benefit payments under said policies may ultimately be restored.

Agents' commissions on Non-Can policies are to be paid as provided for in paragraph 19 hereof.

(b) Surplus of the Accident Company (not including funds received from the Life Company representing a share of the net profits of its Accident and Health Department) not required for the successful conduct and operation of its business, shall be used for the purpose of restoring benefits under all policies not in benefit and increasing future payments under policies in benefit. Such available funds shall from time to time be added to the reserves for such policies until such time as adequate reserves have been established for the full restoration of such policies, at which time the Accident Company will fully assume and reinsure all such policies not in benefit, and at said time said policies not in benefit shall be deemed to be fully restored. As the rate of benefits is increased or restored, the rate of agents' commissions shall be correspondingly increased.

(c) Funds received from the Life Company, representing one-half of the net profits of its Accident and Health Department shall be used exclusively for the purpose of making up deficiency in payments of disability benefits to claimants who have been paid less than they

3991 were entitled to receive under their policies as originally written, and in making up deficiencies in payments to agents who have been paid less than they were entitled to receive as commissions relating to Non-Can policies.

After policies not in benefit shall have been fully reinsured, all surplus funds of the Accident Company not required for the successful conduct and operation of its business, shall be used for the purpose of making up deficiency in
3992 payments of disability benefits to claimants who have been paid less than they were entitled to receive under their policies as originally written, and of deficiency in payments of commissions to agents.

(d) The Accident Company shall not be required to pay or restore full benefits under policies as originally written, except in the manner and to the extent hereinabove set forth.

3993 (e) Upon full restoration of benefits, payments of deficiencies in benefit installments previously paid and restoration and restitution of commissions to agents, the Life Company will be released from its obligation to pay to the Accident Company a portion of the net profits of the Accident and Health Department.

(f) No dividends shall be paid to stockholders of the Accident Company until after full

restoration of benefits, payment of deficiencies in benefit installments previously paid and restoration and restitution of commissions to agents (in each case without interest on deficiencies), and until a surplus of $2,500,000 shall have been accumulated.

(g) The basis to be used in determining the adequacy of reserves shall be the New York Standard Table, with the variable factor limited to the actual experience of the Pacific Mutual and/or the Accident Company with Non-Can Accident and Health insurance, or such other table or basis as shall be required by the laws of the State of California.

15. All of the Pacific Mutual assets not transferred and delivered to the Life Company, and the proceeds of any claim, right or cause of action collected by the Conservator, shall be transferred, assigned and conveyed to the Accident Company. The assets to be transferred to the Accident Company shall be in accordance with the allocation to the Accident and Health Department of Pacific Mutual, as shown in said financial statement of July 22, 1936 (subject to appropriate adjustments for assets acquired or disposed of in the course of business trans-

actions occurring since said date to date of execution of the contract of reinsurance). The selection of additional assets to be transferred to the Accident Company pursuant to this plan, shall be made by the Commissioner and approved by Transamerica group.

16. On the assumption that the value of the assets and the required reserves will be approximately the same on the effective date of the proposed reinsurance agreement as the asset values and reserves set forth in said financial statement of July 22, 1936, the exhibits introduced in the pending proceedings and marked Exhibits G-2, G-3 and G-4, indicate the approximate amount of assets to be taken over by the Accident Company, the approximate amount of required reserves, the approximate amount of liabilities to be assumed and reinsured by the Accident Company, and the capital structure of the Accident Company. The proposal to pay benefits, on claims arising subsequent to July 22, 1936, according to the schedule of reduced benefits hereinabove set forth, is based upon the figures and statistics contained in said financial statement of July 22, 1936, and shall be subject to examination, verification, adjustment and extension of the data contained in said financial

4000 statement, to the effective date of the agreement contemplated by this proposal.

17. Representation on the Board of Directors of the Accident Company will be offered to interested groups of policyholders and agents; and in the conduct of its business the Accident Company will retain all satisfactory employees of the Pacific Mutual.

4001 18. The Accident Company shall have the right to engage in a general accident and health insurance business.

19. The Accident Company will enter into equitable agreements with such agents of the Pacific Mutual as desire to become associated with the Accident Company, and so long as any such agent remains in the service of the Acci-
4002 dent Company, renewal commissions will be paid such agent on policies written by him for the Pacific Mutual and reinsured by the Accident Company, in accordance with the terms and provisions of his Pacific Mutual agency contract covering such business, as herein modified. This proposal contemplates the temporary payment of disability benefits under the Non-Can policies on a reduced basis. It is believed that agents are interested in the restoration of full

benefit payments under Non-Can policies at the earliest practicable date, and, to that end, are willing to cooperate with proponent by deferring payment of a part of their commissions which would otherwise be payable to them. It is proposed that commissions payable to agents on Non-Can policies shall be adjusted by a reduction thereof corresponding to the percentage of reduction of benefit payments in effect for each class of policies as shown in the schedule hereinabove set forth. As the rate of benefit payments under policies is increased, commissions to agents will at the same time be correspondingly increased.

20. The Accident Company will agree to pay the Conservator a sum equal to all legal and valid claims filed with the Conservator and allowed by the Court, except valid claims of any character which may be allowed by the Court and paid by the Conservator prior to the transfer and delivery of Pacific Mutual assets to the Accident Company. In the event that claims of any kind not specifically assumed by the Life Company and not arising out of the business transacted by said company on its own account, shall be asserted against the Life Company and the Life Company shall be required by the final

judgment of any court of competent jurisdiction to pay or discharge such claims, or in case the Life Company is made a party defendant in any suit or suits arising out of the pending proceedings, the Accident Company shall reimburse the Life Company for all amounts so determined and paid and also its reasonable costs and expenses incurred in connection with any such litigation.

The foregoing sets forth the essential features of the plan of the Transamerica group for the reinsurance of the business of Pacific Mutual, as modified and amended. If this proposal is accepted, appropriate agreements will be prepared and executed which will clearly and definitely express the intentions and the obligations of the parties thereto. In addition to the matters outlined in this proposal, such agreements will contain such other provisions as may be mutually agreed upon by the Conservator and the Transamerica group, including such provisions as are usually contained in reinsurance agreements.

In a letter addressed to the California Insurance Commissioner, dated October 18, 1936, Transamerica group further states:

"If, however, it is your opinion and the view of the Court that restoration of benefits and

restitution in respect of deficiencies can be made in a manner which is deemed to be more equitable than as proposed by us, we will agree that all of said funds of the Accident Company from whatever source shall be applied for the benefit of Non-Can policyholders on such basis as the Court may find proper, without payment, however, of interest on deficiencies."

and the plan set forth in this proposal will be amended in this respect to conform with the Court's determination.

If, in the opinion of the Conservator and the Court, the proposal hereinabove outlined can be modified so as to facilitate and make more effective its purposes, the Transamerica group will give careful and sympathetic consideration to any suggestions for the improvement of its general plan, to the end that all interested persons, and particularly policyholders in all groups, may be accorded treatment that is as fair, just and equitable as it is possible to secure under all the circumstances.

Dated at Los Angeles, California, November 21, 1936.

L. M. GIANNINI

4012 EXHIBIT G-1

LIFE COMPANY
PRO-FORMA FINANCIAL STATEMENT
July 22, 1936

Assets:		
Cash Paid in by Transamerica Group	3,000,000.00	
Life Departments (Exhibit 4)	190,206,813.27	
Accident & Health Department (Exhibit 4)	2,419,804.26	
4013 Total Assets		195,626,617.53
Liabilities & Reserves:		
Life Dept. Liabilities & Reserves (Exhibit 4)	190,206,813.27	
Reserve for Supplementary Contracts	198,000.00	
Agents Commissions Accrued	117,284.67	
Taxes Accrued	100,000.00	
Reserve for Claim Investigation	30,000.00	
4014 Reserve for Unpaid Losses—A. & H. Dept.	614,987.00	
Reserve for Unearned Premium—A. & H. Dept.	1,359,532.59	
Total Liabilities & Reserves		192,626,617.53
Capital & Surplus:		
Capital Stock	1,000,000.00	
Surplus	2,000,000.00	
Total Capital & Surplus		3,000,000.00
Total Liabilities, Reserves, Capital & Surplus		195,626,617.53

4015 EXHIBIT G-2

ACCIDENT COMPANY

PRO-FORMA FINANCIAL STATEMENT

July 22, 1936.

Assets:		
Cash Paid in by Transamerica Group	1,608,200.00	
*Note Receivable—Transamerica Group	500,000.00	
4016 *Deferred Receivable — Transamerica Group	7,000,000.00	
Other Assets (See Exhibit 4)	30,082,794.15	
Total Assets		39,190,994.15
Liabilities & Reserves:		
Unearned Int. & Rent Paid in Advance	587.23	
4017 Salaries, Rents & Other Expense Accrued	34,000.00	
Agents Commissions Accrued	40,000.00	
Taxes Accrued	59,050.00	
Reserve for Conservatorship Exp., etc.	191,946.01	
Reserve for Return Premiums —Suspense	17,291.43	
Reserve for Claim Investigation & Exp.	820,020.00	
Reserve for Real Estate	308,224.45	
Reserve for Mortgage Loans	128,289.04	

4018	Reserve for Security Fluctuation	105,648.00	
	Reserve for Unpaid Losses & Claims	19,554,000.00	
	Reserve for Unearned Premium (1,550,000) and for Active Policies—to maintain schedule of benefits set forth in paragraph 13(c) of proposal	9,600,000.00	
4019	Total Liabilities & Reserves		30,859,056.16
	Capital & Surplus:		
	Capital Stock—Class "A"—$1 Par, 254,100 shares	254,100.00	
	Capital Stock—Class "B"—$1 Par, 254,100 shares	254,100.00	508,200.00
	Surplus (of which $7,000,000.00 is deferred)		7,823,737.99
4020	Total Liabilities, Reserves, Capital & Surplus		39,190,994.15

*These items represent the payments to be made by Transamerica Group at the rate of $500,000 per year for fifteen years under the terms of its proposal. The first payment which is due one year after the date of the agreement contemplated by the proposal will be qualified as an immediate admissible asset by being reduced to a promissory note, due one year, properly secured by collateral, and bearing interest at the at the rate of 4½% per annum.

Transamerica Group will likewise qualify the second of such annual payments if necessary to cover any expenses or losses of the Company which cannot be defrayed out of the Company's surplus.

EXHIBIT G-3

PACIFIC MUTUAL LIFE INSURANCE COMPANY

Financial Statement Showing Allocation of Assets & Liabilities to Life Company and Accident Company July 22, 1936, Constructed from July 22, 1936 Financial Statement of the Pacific Mutual Life Insurance Company.

	Total	To Life Company	To Accident Company
Assets:			
Total Admitted Assets of Life Dept. (Ex. 5)	196,300,381.38	190,206,813.27	6,093,568.11
Total Admitted Assets of A. & H. Dept. (Ex. 5)	26,409,030.30	2,419,804.26	23,989,226.04
Total Assets	222,709,411.68	192,626,617.53	30,082,794.15
Liabilities & Reserves:			
Total Liab. & Reserves of Life Dept. (Ex. 5)	190,206,813.27	190,206,813.27	——
Unearned Int. & Rent Paid in Advance	587.23		587.23
Salaries, Rent & Other Exp. Accrued	34,000.00		34,000.00
*Agents Commissions Accrued	157,284.67	117,284.67	40,000.00
*Taxes Accrued (A. & H. Dept.)	159,050.00	100,000.00	59,050.00
Reserve for Conservatorship Exp. etc.	191,946.01		191,946.01

4024	Reserve for Return Premium Suspense	17,291.43		17,291.43
	*Reserve for Claim Investigation Exp.	850,020.00	30,000.00	820,020.00
	Reserve for Real Estate	308,224.45		308,224.45
	Reserve for Mortgage Loans	128,289.04		128,289.04
	Reserve for ecurity Fluctuation	105,648.00		105,648.00
	*Reserve for Supplementary Contracts (A. & H. Dept.)	198,000.00	198,000.00	—
4025	Reserve for Unpaid Losses & Claims (A. & H. Dept.)	20,168,987.00	614,987.00	19,554,000.00
	*Reserve for Unearned Premium (A. & H. Dept.)	2,909,532.59	1,359,532.59	1,550,000.00
	Additional Reserve for Non-Can Policies	24,183,742.00		24,183,742.00
	Total Liabilities & Reserves	239,619,415.69	192,626,617.53	46,992,798.16
4026	Capital & Surplus (or Deficit)			
	Capital	508,200.00	254,100.00	254,100.00
	Surplus (Deficit)	(17,418,204.01)	(254,100.00)	(17,164,104.01)
	Total Liabilities, Reserves & Capital	222,709,411.68	192,626,617.53	30,082,794.15

*Allocation of these items between the two companies is arbitrary and subject to minor adjustment upon ascertainment of correct figures.

EXHIBIT G-4

4027

PACIFIC MUTUAL LIFE INSURANCE COMPANY

COMBINED FINANCIAL STATEMENT OF LIFE AND ACCIDENT DEPARTMENTS CONSTRUCTED FROM STATEMENTS SUBMITTED BY INSURANCE COMMISSIONER JULY 22, 1936

	Life Dept.	Accident Dept.	Total
LEDGER ASSETS			
Book value of real estate	16,394,057.98	2,610,249.56	19,004,307.54
Mortgage loans on real estate	68,235,437.70	16,390,154.40	84,625,592.10
4028 Loans secured by Bonds, Stocks etc.	3,739,188.07		3,739,188.07
Loans to Policyholders	32,623,109.42		32,623,109.42
Premium Notes on Pol. in force	2,280,871.80		2,280,871.80
Book value of bonds	55,002,791.48	4,095,072.65	59,097,864.13
Book value of stocks	4,743,794.82	2,127,034.05	6,870,828.87
Cash in company's office	408,873.00	152,730.18	561,603.18
Cash in Trust Co. & Bk. Dep.—no int.	4,913,750.28	189,103.65	5,102,853.93
Cash in Trust Co. & Bk. Dep.—on int.	3,200,000.00		3,200,000.00
Bills Receivable	15,156.06		15,156.06
4029 Agents Balances	205,558.66	28,733.82	234,292.48
		3,483.15	3,483.15
Deposits in Suspended Banks & Susp. item	–244,402.10	–23,429.99	–267,832.09
Gross premiums, less return premiums and insurance in course of coll.		617,995.46	617,995.46
Accounts Receivable		30.00	30.00
Treasury Stock		273.00	273.00
Due for reinsurance on paid losses		2,691.22	2,691.22
Employees stock purchase plan		251,583.76	251,583.76
Total Ledger Assets	191,518,187.17	26,445,704.91	217,963,892.08

4030	NON-LEDGER ASSETS				
	Interest due & accrued on mtges.		636,571.40	159,419.49	795,990.89
	Do	Col. loans	11,821.65		11,821.65
	Do	Pol. loans	1,251,572.16		1,251,572.16
	Do	Bonds	484,495.17	49,328.72	533,823.89
	Do	Deposits	6,607.33		6,607.33
	Rents Accrued		15,298.57	2,295.45	17,594.02
	Market val. of stocks over book value		387,238.31	201,665.95	588,904.26
	Net uncollected and def. premiums		3,376,937.56		3,376,937.56
4031	Allowed value col. loans not on ledger		9,100.69		9,100.69
	Gross Assets		197,697,830.01	26,858,414.52	224,556,244.53
	DEDUCT ASSETS NOT ADMITTED				
	Payroll & Salary Suspense Acct.		21,926.23		21,926.23
	Other Susp. & Cashier's abeyance & agents balances		247,265.36	28,733.82	275,999.18
	Bills Receivable		15,156.06	30.00	15,186.06
4032	Premiums Notes & Loans in excess of val.		5,000.00		5,000.00
	Deposits in suspended banks		32,321.02	3,483.15	35,804.17
	Book value of bonds over market		1,075,779.96	160,639.26	1,236,419.22
	Treasury Stock (Company's stock owned)			273.00	273.00
	Employees stock purchase plan			251,583.76	251,583.76
	Certain premiums in course of coll.			4,641.23	4,641.23
	Total Assets Not Admitted		1,397,448.63	449,384.22	1,846,832.85
	Total Admitted Assets		196,300,381.38	26,409,030.30	222,709,411.68

Exhibit G-4
(Continued)

PACIFIC MUTUAL LIFE INSURANCE CO.
COMBINED FINANCIAL STATEMENT
JULY 22, 1936

	Life Dept.	Accident Dept.	Total
LIABILITIES, SURPLUS & OTHER FUNDS			
Net Reserves after deducting $208,966 for reinsured risks	160,746,515.00		160,746,515.00
Res. for T. & P. disability included in life pol.	10,648,781.00		10,648,781.00
Present Value of amounts not yet due on sup. contracts not involving life contingencies	6,041,375.00		6,041,375.00
Res. for unpd. losses & Claims (Life Dept.)	1,612,409.00		1,612,409.00
Due and unpaid on Sup. contracts	20,533.56		20,533.56
Div. left with co. to accumulate at int.	4,427,612.00		4,427,612.00
Gross premiums paid in advance	1,526,783.00		1,526,783.00
Unearned int & Rent paid in advance	662,199.90	587.23	662,787.13
Agents commissions due or accrued	18,650.69	157,284.67	175,935.36
Salaries, rents & expenses accrued	102,559.35	34,000.00	136,559.35
Medical examiners and legal fees accrued	36,331.41		36,331.41
Accrued taxes	736,823.00	159,050.00	895,873.00

4036	Dividends due policyholders	43,650.00		43,650.00
	Div. declared on or apportioned to pol.	1,068,313.00		1,068,313.00
	Do to def. div. pol.	18,452.85		18,452.85
	Further div. res. on def. div. pol.	59,631.00		59,631.00
	Renewal Bonus Fund	23,039.00		23,039.00
	Miscellaneous liabilities	15,786.93		15,786.93
	Reserve for Real Estate	494,083.17	308,224.45	802,307.62
	" " Mtge. loans	952,768.34	128,289.04	1,081,057.38
4037	" " Col. loans	567,516.07		567,516.07
	" " Security Fluctuation	383,000.00	105,648.00	488,648.00
	" " Unpaid losses & claims		20,168,987.00	20,168,987.00
	" " Investigation & Claim Exp.		850,020.00	850,020.00
	" " Unearned premiums		2,909,532.59	2,909,532.59
	" " Supplementary Contracts		198,000.00	198,000.00
	" " Return Premiums Suspense		17,291.43	17,291.43
	" " Non-Can policies		24,183,742.00	24,183,742.00
	Total	190,206,813.27	49,220,656.41	239,427,469.68
4038	CAPITAL	254,100.00	254,100.00	508,200.00
	Surplus or (Deficit)	5,839,468.11	(-23,065,726.11)	(-17,226,258.00)
	Total Liabilities, Surplus & Other Funds	190,300,381.38	26,409,030.30	222,709,411.68

Endorsed: Filed Nov. 25, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy. D. 11

4039 [TITLE OF COURT AND CAUSE.]

Plan of Wm. H. Neblett for Pacific Mutual Life Insurance Company of California—Its Liquidation and Sale.

Comes now Wm. H. Neblett *in pro persona* and by his attorneys, R. Dean Warner, LeRoy B. Lorenz and E. Walter Guthrie, with consent obtained in open court and files this, his plan for
4040 liquidation and sale of Pacific Mutual Life Insurance Company of California.

It is obvious from the evidence so far taken before the court that further efforts of the conservator are futile and that an order of liquidation is inevitable. The motion of the Insurance Commissioner entitled "Petition for Approval of Rehabilitation and Reinsurance Agreement" of
4041 the company is but a proceeding in liquidation under another name. It is suggested that the court treat the Insurance Commissioner's petition as one for liquidation under the code, order a liquidation in accordance with article 14, amended by chapter 219, Statutes 1935, of the Insurance Code of California, and direct in the order of liquidation a sale of all of the assets of the Pacific Mutual Life Insurance Company of Cali-

4042 fornia within a limited time to the highest and best bidder.

The evidence so far introduced fully supports an order of liquidation and sale. Troublesome questions raised in the present hearing on the constitutionality of the Insurance Code would be entirely obviated, as it is practically certain that no successful assault may be made upon the constitutionality of that part of the code which sets
4043 up a plan of liquidation for a failing insurance corporation.[1]

The court may treat at least one of the plans on file as a basic bid and confirm the title to the assets of the company in that bidder after due opportunity given to, and failure by any other responsible bidder to raise the bid on file at any time before confirmation.

4044 The Commissioner's plan cannot be treated as a bid because it provides only for the purchase of a part of the assets of the Pacific Mutual Life Insurance Company through a new and wholly owned subsidiary company financed solely from the assets of the old. It is not possible in law to sell the assets of a failed corporation to itself and pay for them with the property of the corporation being liquidated,

4045 Wherefore, intervenor, Wm. H. Neblett, prays that:

1. An order of liquidation be made;

2. The court submit all of the assets of Pacific Mutual Life Insurance Company for bids;

3. The court accept the highest and best bid of a responsible insurer, and that it confirm the sale to him.

WM. H. NEBLETT,
Intervener.

4046

WM. H. NEBLETT,
In Pro. Prosona;
R. DEAN WARNER,
LEROY B. LORENZ and
E. WALTER GUTHRIE,
By WM. H. NEBLETT,
Attorneys for Intervenor.

4047

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1. The liquidation of this company cannot be had in the Federal courts. It cannot become a bankrupt. Bankruptcy Act, Section 4, 11 U. S. C. A. 22; nor may a receiver be appointed in the Federal courts as the Insurance Code provides a complete scheme of liquidation. Commonwealth of Pennsylvania v. Williams, 294 U. S. 176, 79 L. ed. 841; Bank v. Hawkins (C. C. A. 5), 42 Fed. (2d) 209.

Endorsed: Filed Nov. 30, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy.

D. 11.

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218

4048 [TITLE OF COURT AND CAUSE.]

Proposal to Reinsure the Business of The Pacific Mutual Life Insurance Company of California as Modified to Conform With Proposed Amendments.

The plan hereinafter outlined contemplates the organization of two corporations under the laws of the State of California. Said companies will be appropriately named, each will be under sep-
4049 arate and independent management, and will be referred to herein as the "Life Company" and the "Accident Company." The Transamerica group of which the Occidental Life Insurance Company is a part, will pay to said corporations an aggregate of $12,108,200.00. The Accident Company will receive a portion of the profits of the Life Company.

The Pacific Mutual Life Insurance Company of California will be hereinafter designated as
4050 "Pacific Mutual." Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as Conservator of the Pacific Mutual Life Insurance Company of California, will be hereinafter referred to as "Conservator." The Superior Court of the State of California in and for the County of Los Angeles will be hereinafter referred to as "the Court." Non-cancellable Income Policies will be hereinafter referred to as

"Non-Can policies." The term "Commissioner" shall mean the present Insurance Commissioner of the State of California or his successor in office.

THE LIFE COMPANY

1. The Life Company shall have a capital of $1,000,000, together with a surplus of $2,000,000, said amounts aggregating $3,000,000, to be paid into the company by the Transamerica group.

2. The Life Company will reinsure and assume the liabilities of the Pacific Mutual under all policies and contracts of insurance, except Non-Can policies, issued or assumed by the Pacific Mutual and outstanding and in force on July 22, 1936, or issued by the Conservator, subject, however, to any and all offsets, rights and defenses then or thereafter existing against said policies or contracts of insurance which would have been available to the Pacific Mutual or the Conservator. Liabilities under Non-Can policies are expressly excluded from the obligations assumed by the Life Company.

3. (a) The Life Company will agree to reinsure and assume, upon the terms and conditions hereinafter set forth, all policies other than Non-Can policies, which have lapsed, upon the reinstatement thereof in accordance with the terms and conditions of each such policy.

(b) The foregoing paragraph (a) is modified to the extent that any policy, other than a Non-Can policy, lapsed since July 22, 1936, will be reinstated during the lifetime of the insured, provided the insured is not in such condition as to be eligible for benefits under his policy, without evidence of insurability, on written application therefor by the insured and payment of all premiums in arrears, if such application is made and premiums are paid within seventy-five (75) days after the approval by the Court of the reinsurance agreement contemplated by this proposal.

(c) Upon reinstatement of a lapsed policy it shall for all purposes be treated (but only from and after the date of reinstatement) the same as if it had been in force on the effective date of the reinsurance agreement contemplated herein, and shall be subject to the terms and conditions of said agreement.

4. The Life Company will pay in full all valid unpaid claims under policies issued or assumed by the Pacific Mutual, other than Non-Can policies, and all claims arising under the policies reinsured by it, and all liabilities which are incident to such policies, subject, however, to any and all defenses, offsets or counterclaims which would have been available to the Pacific Mutual or to the Conservator.

4057 5. (a) The Conservator shall sell, assign, convey and transfer, or cause to be sold, assigned, conveyed and transferred to the Life Company, vesting title thereto in the Life Company free and clear of encumbrances, tax or other liens or adverse claims, Pacific Mutual assets equal in value to the aggregate sum of the legal reserves required for the policies and contracts reinsured by the Life Company and such 4058 other liabilities assumed by the Life Company in its reinsurance agreement.

(b) All of the Pacific Mutual assets to be acquired by the Life Company, as hereinabove set forth, shall be taken at the aggregate values as shown in the financial statement of the Pacific Mutual Life Insurance Company as of July 22, 1936 (subject to appropriate adjustments for assets acquired or disposed of in the course of 4059 business transactions occurring since said date to the date of execution of the contract of reinsurance) provided the court shall find and decree that said values represent the fair value of said assets.

(c) The amount of the reserves required for the business reinsured and the aggregate value of the assets to be acquired by the Life Company shall be fixed and determined as of the effective

4060 date of the contemplated reinsurance agreement, and the assets shall be taken at the value determined according to the provisions of 5.(b) above.

(d) On the assumption that the amount of the required reserves and the value of assets will be approximately the same on the effective date of the proposed reinsurance agreement as the asset values and reserves set forth in said financial statement as of July 22, 1936, the exhibits
4061 introduced in the pending proceedings and marked Exhibits G-1, G-3 and G-4, will reflect the approximate amount of assets to be acquired, the approximate amount of required reserves, the approximate amount of liabilities to be assumed, and the capital structure of the Life Company.

6. The Life Company will engage in a general life, accident and health insurance business
4062 and will segregate its business by establishing three departments, namely:

(1) Participating Life Insurance Department;

(2) Non-Participating Life Insurance Department; and

(3) General Accident and Health Insurance Department.

4063 To each department will be allocated a portion of the Pacific Mutual assets acquired by the Life Company equal in value to the amount of reserves and liabilities of such department. The selection of assets allocated to each department shall be made by the Conservator and approved by the Transamerica group.

7. The Life Company will assume no claims or liabilities of any kind or nature against the 4064 Pacific Mutual or the Conservator other than those hereinabove set forth. The Life Company will pay to the Conservator such amount of money, if any, hereafter paid by the Conservator in satisfaction of claims filed by dissenting holders of policies reinsured under the terms of this proposal and allowed by the Court. There shall be no moratorium on policy loans or surrenders for cash value.

4065 8. Representation on the Board of Directors of the Life Company will be offered to interested groups of policyholders and agents; and in the conduct of its business the Life Company will retain all satisfactory employees of the Pacific Mutual.

9. The Life Company will enter into equitable agency agreements with such agents of the Pacific Mutual as desire to become associated with

the Life Company, and so long as any such agent remains in the service of the Life Company, renewal commissions will be paid such agent on policies written by him for the Pacific Mutual and reinsured by the Life Company, in accordance with the terms and provisions of his Pacific Mutual agency contract covering such business. In computing commissions under Pacific Mutual agency contracts policies reinsured by the Life Company shall be considered a continuation of existing policies and not the writing of new business.

10. The Life Company will pay to the Accident Company fifty per cent (50%) of the net profits of the business of its Accident Department, payments to be made in annual installments, subject to the terms and conditions and termination of such payments, as hereinafter set forth.

THE ACCIDENT COMPANY

11. The capital stock of the Accident Company will consist of 254,100 shares of Class A common stock and 254,100 shares of Class B common stock. All of said stock shall be of the par value of $1.00 per share and shall have the same voting and dividend rights. The Trans-

4069 america group will pay $508,200 for said stock, totaling 508,200 shares. Class A common stock shall be callable at any time within ten (10) years at $30 per share. In the event of liquidation of the Accident Company after restoration and restitution of full benefits and agents' commissions, Class A stock shall participate in the distribution of assets to the extent of $10 per share, after which the Class B stock shall par-
4070 ticipate in such distribution of assets to the extent of $10 per share, and thereafter both classes of stock shall participate equally in any distribution of assets.

The Class A stock of the Accident Company shall either be delivered immediately to the stockholders of Pacific Mutual, or upon the order of the Court, be impounded with the Insurance Commissioner until there shall have been full and
4071 complete restoration of benefits under Non-Can policies, full restitution in deficiencies in benefit payments to Non-Can policyholders, and full restoration and restitution to agents on account of commissions relating to Non-Can policies, or upon such other terms and conditions as may be set forth in said order of the Court.

12. In addition to the payment of $508,200 as set forth in the preceding paragraph, the

4072 Transamerica group will pay to the Accident Company $1,100,000 and will make further payments to the Accident Company of a sum of $7,500,000, payable in installments at the rate of $500,000 per year.

For the purpose of providing additional initial surplus of the Accident Company, the Transamerica group will immediately collateralize the first annual payment in the sum of $500,000 so
4073 as to qualify the sum so collateralized as a present admissible asset of the Accident Company to bear interest at the rate of 4¼%, and agrees to likewise collateralize and qualify the second annual payment of $500,000, if necessary, to cover and pay any expenses or losses of the Accident Company which cannot be defrayed out of the Accident Company's available surplus.

4074 The Transamerica group reserves the right to make payment at any time prior to the expiration of said fifteen year period of all or any part of the unpaid amount of said sum of $7,500,000.

13. (a) The Accident Company will assume and reinsure liabilities of the Pacific Mutual and the Conservator under all Non-Can Accident and Health policies issued by the Pacific Mutual and in force on the effective date of the agreement

4075 contemplated by this proposal, subject to the policy terms and conditions and also to the terms, conditions and limitations, and only to the extent, hereinafter specifically provided, and subject also to any and all claims, defenses, actions and rights in connection therewith, which would have been available to the Pacific Mutual or the Conservator.

(b) The Accident Company will pay, with-
4076 out deduction, every valid claim for disability benefits under any such policy for disability arising prior to July 22, 1936, with respect to which claim or notice of claim was duly filed in accordance with the terms of the policy on or before August 12, 1936, and will likewise pay all liabilities, without deduction, under settlement agreements made by the Pacific Mutual with claimants under any such policy. All such claims are sub-
4077 ject, however, to all defenses and rights which would have been available to the Pacific Mutual or to the Conservator.

(c) As to all other claims for disability benefits under Non-Can policies, now pending or hereafter arising, the Accident Company's liability in any such case shall be limited to the percentages of the monthly disability benefits set forth in the following schedule:

4078

Prem. Class	Issued under Rate Books	Policy Forms	Issued Under Policy No.	Percentage of Original Monthly Benefit Assumed New Company
1918	A1445-A1445Z A1445Y-A1445X A1445W	A231 to A288, inc.	2658601 to 2698150 4600501 to 4628000 4711101 to 4712600 4730901 to 4731100	50%
4079				
1921	A1687-A1687Z A1687Y-A1687X A1687W	A291 to A 294, inc. A365-A366	4628001 to 4700000	59%
1926	A1958-A1958Z	A382-A383 A386-A387 A387Z	5500001 to 5600000	65%
1929	A2293	A382-A383 A386-A387 A387Z	5600001 to 5620000	72%
4080				
1931	A2367	A753 to A756, inc. A763 - A764	5620001 to 5635000	78%
1932	A2432-A2432Z A2499	A775 to A780, inc.	5635001 to 6000000	93%
	A2499	Aggregate A1216 to A1221, inc.	6500001 to 7000000	93%
1935	A2567	Aggregate A1226 to A1239, inc.	7000001 to 7100000	93%

4081 Benefits under all such policies shall be reduced to the extent indicated in the foregoing schedule but shall be subject to restoration of monthly benefits and restitution of deficiencies in installments previously paid as hereinafter provided.

(d) Notwithstanding the reduction in benefits and the limitation of the obligation of the Accident Company to make monthly disability payments, as set forth in the preceding paragraph, each holder of any such policy, to be en-
4082 titled to the benefit of the proposed reinsurance agreement, shall be obligated to continue payment of premiums in the amount stipulated in his policy.

14. (a) At the end of five (5) years from the effective date of the contemplated reinsurance agreement, or at such earlier date as may be fixed by the Commissioner, the reserve requirements shall be recomputed and if reserves
4083 and funds available for reserves are then sufficient to justify an increase in the schedule of benefits set forth in paragraph 13 (c) hereof, benefit payments on claims then in force at reduced rates and benefits on future claims will be increased to a rate approved by the Commissioner. Thereafter redetermination of reserve requirements and available reserves for the purpose of adjusting benefit rates shall be made from time to time upon request of the Accident Company or the Commissioner, to the end that

full benefit payments under said policies may ultimately be restored.

Agents' commissions on Non-Can policies are to be paid as provided for in paragraph 19 hereof.

(b) Surplus of the Accident Company (not including funds received from the Life Company representing a share of the net profits of its Accident and Health Department) not required for the successful conduct and operation of its business, shall be used for the purpose of restoring benefits under all policies not in benefit and increasing future payments under policies in benefit. Such available funds shall from time to time be added to the reserves for such policies until such time as adequate reserves have been established for the full restoration of such policies, at which time the Accident Company will fully assume and reinsure all such policies not in benefit, and at said time said policies not in benefit shall be deemed to be fully restored. As the rate of benefits is increased or restored, the rate of agents' commissions shall be correspondingly increased.

(c) Funds received from the Life Company, representing one-half of the net profits of its Accident and Health Department, shall be used exclusively for the purpose of making up deficiency in payments of disability benefits to claimants who have been paid less than they were

4087 entitled to receive under their policies as originally written, and in making up deficiencies in payments to agents who have been paid less than they were entitled to receive as commissions relating to Non-Can policies.

After policies not in benefit shall have been fully reinsured, all surplus funds of the Accident Company not required for the successful conduct and operation of its business, shall be used for the purpose of making up deficiency in payments
4088 of disability benefits to claimants who have been paid less than they were entitled to receive under their policies as originally written, and of deficiency in payments of commissions to agents.

(d) The Accident Company shall not be required to pay or restore full benefits under policies as originally written, except in the manner and to the extent hereinabove set forth.

(e) Upon full restoration of benefits, pay-
4089 ments of deficiencies in benefit installments previously paid and restoration and restitution of commissions to agents, the Life Company will be released from its obligation to pay to the Accident Company a portion of the net profits of the Accident and Health Department.

(f) No dividends shall be paid to stockholders of the Accident Company until after full restoration of benefits, payment of deficiencies in benefit installments previously paid and restoration and restitution of commissions to agents (in

each case without interest on deficiencies), and until a surplus of $2,500,000 shall have been accumulated.

(g) The basis to be used in determining the adequacy of reserves shall be the New York Standard Table, with the variable factor limited to the actual experience of the Pacific Mutual and/or the Accident Company with Non-Can Accident and Health insurance, or such other table or basis as shall be required by the laws of the State of California.

15. All of the Pacific Mutual assets not transferred and delivered to the Life Company, and the proceeds of any claim, right or cause of action collected by the Conservator, shall be transferred, assigned and conveyed to the Accident Company. The assets to be transferred to the Accident Company shall be in accordance with the allocation to the Accident and Health Department of Pacific Mutual, as shown in said financial statement of July 22, 1936 (subject to appropriate adjustments for assets acquired or disposed of in the course of business transactions occurring since said date to date of execution of the contract of reinsurance). The selection of additional assets to be transferred to the Accident Company pursuant to this plan, shall be made by the Commissioner and approved by Transamerica group.

4093 16. On the assumption that the value of the assets and the required reserves will be approximately the same on the effective date of the proposed reinsurance agreement as the asset values and reserves set forth in said financial statement of July 22, 1936, the exhibits introduced in the pending proceedings and marked Exhibits G-2, G-3 and G-4, indicate the approximate amount of assets to be taken over by the Accident Company, the approximate amount of required reserves, the
4094 approximate amount of liabilities to be assumed and reinsured by the Accident Company, and the capital structure of the Accident Company. The proposal to pay benefits, on claims arising subsequent to July 22, 1936, according to the schedule of reduced benefits hereinabove set forth, is based upon the figures and statistics contained in said financial statement of July 22, 1936, and shall be subject to examination, verification, adjustment and extension of the data contained in said financial statement, to the effective date of the agree-
4095 ment contemplated by this proposal.

17. Representation on the Board of Directors of the Accident Company will be offered to interested groups of policyholders and agents; and in the conduct of its business the Accident Company will retain all satisfactory employees of the Pacific Mutual.

18. The Accident Company shall have the right to engage in a general accident and health insurance business.

4096 19. The Accident Company will enter into equitable agreements with such agents of the Pacific Mutual as desire to become associated with the Accident Company, and so long as any such agent remains in the service of the Accident Company, renewal commissions will be paid such agent on policies written by him for the Pacific Mutual and reinsured by the Accident Company, in accordance with the terms and provisions of his Pacific Mutual agency contract covering such
4097 business, as herein modified. This proposal contemplates the temporary payment of disability benefits under the Non-Can policies on a reduced basis. It is believed that agents are interested in the restoration of full benefit payments under Non-Can policies at the earliest practicable date, and, to that end, are willing to cooperate with proponent by deferring payment of a part of their commissions which would otherwise be payable to them. It is proposed that commissions
4098 payable to agents on Non-Can policies shall be adjusted by a reduction thereof corresponding to the percentage of reduction of benefit payments in effect for each class of policies as shown in the schedule hereinabove set forth. As the rate of benefit payments under policies is increased, commissions to agents will at the same time be correspondingly increased.

20. The Accident Company will agree to pay the Conservator a sum equal to all legal and valid claims filed with the Conservator and allowed by

the Court, except valid claims of any character which may be allowed by the Court and paid by the Conservator prior to the transfer and delivery of Pacific Mutual assets to the Accident Company. In the event that claims of any kind not specifically assumed by the Life Company and not arising out of the business transacted by said Company on its own account, shall be asserted against the Life Company and the Life Company shall be required by the final judgment of any court of competent jurisdiction to pay or discharge such claims, or in case the Life Company is made a party defendant in any suit or suits arising out of the pending proceedings, the Accident Company shall reimburse the Life Company for all amounts so determined and paid and also its reasonable costs and expenses incurred in connection with any such litigation.

The foregoing sets forth the essential features of the plan of the Transamerica group for the reinsurance of the business of Pacific Mutual, as modified and amended. If this proposal is accepted, appropriate agreements will be prepared and executed which will clearly and definitely express the intentions and the obligations of the parties thereto. In addition to the matters outlined in this proposal, such agreements will contain such other provisions as may be mutually agreed upon by the Conservator and the Transamerica group, including such provisions as are usually contained in reinsurance agreements.

In a letter addressed to the California Insurance Commissioner, dated October 18, 1936, Transamerica group further states:

"If, however, it is your opinion and the view of the Court that restoration of benefits and restitution in respect of deficiencies can be made in a manner which is deemed to be more equitable than as proposed by us, we will agree that all of said funds of the Accident Company from whatever source shall be applied for the benefit of Non-Can policyholders on such basis as the Court may find proper, without payment, however, of interest on deficiencies."

and the plan set forth in this proposal will be amended in this respect to conform with the Court's determination.

If, in the opinion of the Conservator and the Court, the proposal hereinabove outlined can be modified so as to facilitate and make more effective its purposes, the Transamerica group will give careful and sympathetic consideration to any suggestions for the improvement of its general plan, to the end that all interested persons, and particularly policyholders in all groups, may be accorded treatment that is as fair, just and equitable as it is possible to secure under all the circumstances.

Dated at Los Angeles, California, November 21, 1936.

L. M. GIANNINI.

EXHIBIT G-1

4105

LIFE COMPANY
PRO-FORMA FINANCIAL STATEMENT
July 22, 1936

Assets:		
Cash Paid in by Transamerica Group	3,000,000.00	
Life Departments (Exhibit 4)	190,206,813.27	
Accident & Health Department (Exhibit 4)	2,419,804.26	
4106 Total Assets		195,626,617.53
Liabilities & Reserves:		
Life Dept. Liabilities & Reserves (Exhibit 4)	190,206,813.27	
Reserve for Supplementary Contracts	198,000.00	
Agents Commissions Accrued	117,284.67	
Taxes Accrued	100,000.00	
Reserve for Claim Investigation	30,000.00	
4107 Reserve for Unpaid Losses—A. & H. Dept.	614,987.00	
Reserve for Unearned Premium—A. & H. Dept.	1,359,532.59	
Total Liabilities & Reserves		192,626,617.53
Capital & Surplus:		
Capital Stock	1,000,000.00	
Surplus	2,000,000.00	
Total Capital & Surplus		3,000,000.00
Total Liabilities, Reserves, Capital & Surplus		195,626,617.53

4108

EXHIBIT G-2

ACCIDENT COMPANY

PRO-FORMA FINANCIAL STATEMENT

July 22, 1936.

Assets:		
Cash Paid in by Transamerica Group	1,608,200.00	
*Note Receivable—Transamerica Group	500,000.00	
4109 *Deferred Receivable — Transamerica Group	7,000,000.00	
Other Assets (See Exhibit 4)	30,082,794.15	
Total Assets		39,190,994.15
Liabilities & Reserves:		
Unearned Int. & Rent Paid in Advance	587.23	
Salaries, Rents & Other Expense Accrued	34,000.00	
4110 Agents Commissions Accrued	40,000.00	
Taxes Accrued	59,050.00	
Reserve for Conservatorship Exp., etc.	191,946.01	
Reserve for Return Premiums —Suspense	17,291.43	
Reserve for Claim Investigation & Exp.	820,020.00	
Reserve for Real Estate	308,224.45	
Reserve for Mortgage Loans	128,289.04	

4111	Reserve for Security Fluctuation	105,648.00	
	Reserve for Unpaid Losses & Claims	19,554,000.00	
	Reserve for Unearned Premium (1,550,000) and for Active Policies—to maintain schedule of benefits set forth in paragraph 13(c) of proposal	9,600,000.00	
	Total Liabilities & Reserves		30,859,056.16
4112	Capital & Surplus:		
	Capital Stock—Class "A"—$1 Par, 254,100 shares	254,100.00	
	Capital Stock—Class "B"—$1 Par, 254,100 shares	254,100.00	508,200.00
	Surplus (of which $7,000,000.00 is deferred)		7,823,737.99
	Total Liabilities, Reserves, Capital & Surplus		39,190,994.15
4113			

*These items represent the payments to be made by Transamerica Group at the rate of $500,000 per year for fifteen years under the terms of its proposal. The first payment which is due one year after the date of the agreement contemplated by the proposal will be qualified as an immediate admissible asset by being reduced to a promissory note, due one year, properly secured by collateral, and bearing interest at the at the rate of 4½% per annum.

Transamerica Group will likewise qualify the second of such annual payments if necessary to cover any expenses or losses of the Company which cannot be defrayed out of the Company's surplus.

4114 EXHIBIT G-3 411

PACIFIC MUTUAL LIFE INSURANCE COMPANY

Financial Statement Showing Allocation of Assets & Liabilities to Life Company and Accident Company July 22, 1936, Constructed from July 22, 1936 Financial Statement of the Pacific Mutual Life Insurance Company.

	Total	To Life Company	To Accident Company
4115 Assets:			411
Total Admitted Assets of Life Dept. (Ex. 5)	196,300,381.38	190,206,813.27	6,093,568.11
Total Admitted Assets of A. & H. Dept. (Ex. 5)	26,409,030.30	2,419,804.26	23,989,226.04
Total Assets	222,709,411.68	192,626,617.53	30,082,794.15
Liabilities & Reserves:			
4116 Total Liab. & Reserves of Life Dept. (Ex. 5)	190,206,813.27	190,206,813.27	—— 411
Unearned Int. & Rent Paid in Advance	587.23		587.23
Salaries, Rent & Other Exp. Accrued	34,000.00		34,000.00
*Agents Commissions Accrued	157,284.67	117,284.67	40,000.00
*Taxes Accrued (A. & H. Dept.)	159,050.00	100,000.00	59,050.00
Reserve for Conservatorship Exp. etc.	191,946.01		191,946.01

Reserve for Return Premium Suspense	17,291.43		17,291.43
*Reserve for Claim Investigation Exp.	850,020.00	30,000.00	820,020.00
Reserve for Real Estate	308,224.45		308,224.45
Reserve for Mortgage Loans	128,289.04		128,289.04
Reserve for Security Fluctuation	105,648.00		105,648.00
*Reserve for Supplementary Contracts (A. & H. Dept.)	198,000.00	198,000.00	——
Reserve for Unpaid Losses & Claims (A. & H. Dept.)	20,168,987.00	614,987.00	19,554,000.00
*Reserve for Unearned Premium (A. & H. Dept.)	2,909,532.59	1,359,532.59	1,550,000.00
Additional Reserve for Non-Can Policies	24,183,742.00		24,183,742.00
Total Liabilities & Reserves	239,619,415.69	192,626,617.53	46,992,798.16
Capital & Surplus (or Deficit)			
Capital	508,200.00	254,100.00	254,100.00
Surplus (Deficit)	(17,418,204.01)	(254,100.00)	(17,164,104.01)
Total Liabilities, Reserves & Capital	222,709,411.68	192,626,617.53	30,082,794.15

*Allocation of these items between the two companies is arbitrary and subject to minor adjustment upon ascertainment of correct figures.

4120

EXHIBIT G-4

PACIFIC MUTUAL LIFE INSURANCE COMPANY

COMBINED FINANCIAL STATEMENT OF LIFE AND ACCIDENT DEPARTMENTS CONSTRUCTED FROM STATEMENTS SUBMITTED BY INSURANCE COMMISSIONER JULY 22, 1936

	Life Dept.	Accident Dept.	Total
LEDGER ASSETS			
Book value of real estate	16,394,057.98	2,610,249.56	19,004,307.54
4121 Mortgage loans on real estate	68,235,437.70	16,390,154.40	84,625,592.10
Loans secured by Bonds, Stocks etc.	3,739,188.07		3,739,188.07
Loans to Policyholders	32,623,109.42		32,623,109.42
Premium Notes on Pol. in force	2,280,871.80		2,280,871.80
Book value of bonds	55,002,791.48	4,095,072.65	59,097,864.13
Book value of stocks	4,743,794.82	2,127,034.05	6,870,828.87
Cash in company's office	408,873.00	152,730.18	561,603.18
Cash in Trust Co. & Bk. Dep.—no int.	4,913,750.28	189,103.65	5,102,853.93
Cash in Trust Co. & Bk. Dep.—on int.	3,200,000.00		3,200,000.00
Bills Receivable	15,156.06		15,156.06
4122 Agents Balances	205,558.66	28,733.82	234,292.48
		3,483.15	3,483.15
Deposits in Suspended Banks & Susp. item	−244,402.10	−23,429.99	−267,832.09
Gross premiums, less return premiums and insurance in course of coll.		617,995.46	617,995.46
Accounts Receivable		30.00	30.00
Treasury Stock		273.00	273.00
Due for reinsurance on paid losses		2,691.22	2,691.22
Employees stock purchase plan		251,583.76	251,583.76
Total Ledger Assets	191,518,187.17	26,445,704.91	217,963,892.08

4123	**NON-LEDGER ASSETS**			
	Interest due & accrued on mtges.	636,571.40	159,419.49	795,990.89
	Do Col. loans	11,821.65		11,821.65
	Do Pol. loans	1,251,572.16		1,251,572.16
	Do Bonds	484,495.17	49,328.72	533,823.89
	Do Deposits	6,607.33		6,607.33
	Rents Accrued	15,298.57	2,295.45	17,594.02
	Market val. of stocks over book value	387,238.31	201,665.95	588,904.26
	Net uncollected and def. premiums	3,376,937.56		3,376,937.56
4124	Allowed value col. loans not on ledger	9,100.69		9,100.69
	Gross Assets	197,697,830.01	26,858,414.52	224,556,244.53
	DEDUCT ASSETS NOT ADMITTED			
	Payroll & Salary Suspense Acct.	21,926.23		21,926.23
	Other Susp. & Cashier's abeyance & agents balances	247,265.36	28,733.82	275,999.18
	Bills Receivable	15,156.06	30.00	15,186.06
4125	Premiums Notes & Loans in excess of val.	5,000.00		5,000.00
	Deposits in suspended banks	32,321.02	3,483.15	35,804.17
	Book value of bonds over market	1,075,779.96	160,639.26	1,236,419.22
	Treasury Stock (Company's stock owned)		273.00	273.00
	Employees stock purchase plan		251,583.76	251,583.76
	Certain premiums in course of coll.		4,641.23	4,641.23
	Total Assets Not Admitted	1,397,448.63	449,384.22	1,846,832.85
	Total Admitted Assets	196,300,381.38	26,409,030.30	222,709,411.68

4126

Exhibit G-4
(Continued)

PACIFIC MUTUAL LIFE INSURANCE CO.
COMBINED FINANCIAL STATEMENT
JULY 22, 1936

	Life Dept.	Accident Dept.	Total
LIABILITIES, SURPLUS & OTHER FUNDS			
4127 Net Reserves after deducting $208,966 for reinsured risks	160,746,515.00		160,746,515.00
Res. for T. & P. disability included in life pol.	10,648,781.00		10,648,781.00
Present Value of amounts not yet due on sup. contracts not involving life contingencies	6,041,375.00		6,041,375.00
Res. for unpd. losses & Claims (Life Dept.)	1,612,409.00		1,612,409.00
Due and unpaid on Sup. contracts	20,533.56		20,533.56
4128 Div. left with co. to accumulate at int.	4,427,612.00		4,427,612.00
Gross premiums paid in advance	1,526,783.00		1,526,783.00
Unearned int & Rent paid in advance	662,199.90	587.23	662,787.13
Agents commissions due or accrued	18,650.69	157,284.67	175,935.36
Salaries, rents & expenses accrued	102,559.35	34,000.00	136,559.35
Medical examiners and legal fees accrued	36,331.41		36,331.41
Accrued taxes	736,823.00	159,050.00	895,873.00

4129	Dividends due policyholders	43,650.00		43,650.00
	Div. declared on or apportioned to pol.	1,068,313.00		1,068,313.00
	Do to def. div. pol.	18,452.85		18,452.85
	Further div. res. on def. div. pol.	59,631.00		59,631.00
	Renewal Bonus Fund	23,039.00		23,039.00
	Miscellaneous liabilities	15,786.93		15,786.93
	Reserve for Real Estate	494,083.17	308,224.45	802,307.62
	" " Mtge. loans	952,768.34	128,289.04	1,081,057.38
4130	" " Col. loans	567,516.07		567,516.07
	" " Security Fluctuation	383,000.00	105,648.00	488,648.00
	" " Unpaid losses & claims		20,168,987.00	20,168,987.00
	" " Investigation & Claim Exp.		850,020.00	850,020.00
	" " Unearned premiums		2,909,532.59	2,909,532.59
	" " Supplementary Contracts		198,000.00	198,000.00
	" " Return Premiums Suspense		17,291.43	17,291.43
	" " Non-Can policies		24,183,742.00	24,183,742.00
	Total	190,206,813.27	49,220,656.41	239,427,469.68
4131	CAPITAL	254,100.00	254,100.00	508,200.00
	Surplus or (Deficit)	5,839,468.11	(-23,065,726.11)	(-17,226,258.00)
	Total Liabilities, Surplus & Other Funds	196,300,381.38	26,409,030.30	222,709,411.68

Endorsed: Filed (as per minute order 12/2/36) Dec. 2, 1936. L. E. Lampton, county clerk; by A. G. Stanham, deputy. Dept. 11.

4132 [TITLE OF COURT AND CAUSE.]

Order Approving Rehabilitation and Reinsurance Agreement.

The petition for approval of rehabilitation and reinsurance agreement verified by Samuel L. Carpenter, Jr., on September 25, 1936, and filed in the above-entitled action on the same date, having duly come on for hearing on October 19, 1936, upon the order to show cause with respect to rehabilitation and reinsurance issued by this
4133 court under date of September 25, 1936; and it appearing that notice of said hearing has been duly given to the persons and in the manner required by said order to show cause; and said hearing having been in progress from day to day thereafter to and including December 3, 1936; and

The petitioner, Samuel L. Carpenter, Jr., Insurance Commissioner of the state of California, as conservator of The Pacific Mutual Life Insurance Company of California, appearing and
4134 being represented by U. S. Webb, attorney-general of the state of California, John L. Flynn, deputy attorney-general of the state of California, Messrs. Mitchell, Silberberg & Knupp and Frank L. Guerena, his attorneys; respondent, The Pacific Mutual Life Insurance Company of California, appearing and being represented by Messrs. Overton, Lyman & Plumb, its attorneys; and various other persons interested herein appearing and being represented by their respective attorneys, as briefly indicated hereafter, to wit:

	Names of Interested Persons	Interest Alleged	Attorneys Representing
4135	Charles Ross Cooper et al.	Holders of Non-Can Policies	Hugh K. McKevitt
	Rupert B. Turnbull et al. for themselves and for other Non-Cancellable Policyholders similarly situated	Holders of Non-Can Policies	Rupert B. Turnbull
4136	Francis Adams, for himself and for other Non-Cancellable Policyholders similarly situated	Holder of Non-Can Policy, under which advanced settlement of disability claim is pending	Rupert B. Turnbull
	George W. Manierre and B. Robert Getts, on their own behalf and on behalf of all similarly situated policyholders	Holders of Non-Can Policies	Messrs. Manierre & Cuthbertson
	E. B. Tilton et al.	Holders of Non-Can Policies	Kenyon F. Lee
4137	Vernon Bettin and William George Dickinson	Holders of Non-Can Policies	Messrs. Bettin, Painter & Wait
	Marshall D. Hall and Joseph C. McManus on behalf of themselves and other holders of Non-Cancellable Income Policies	Holders of Non-Can Policies	H. S. Dottenheim
	Neil S. McCarthy	Holder of Non-Can Policy	Neil S. McCarthy
	Ralph R. Huesman	Commercial Accident Policyholder; Non-Can Policyholder and Life Policyholder	Neil S. McCarthy

	Names of Interested Persons	Interest Alleged	Attorneys Representing
4138	Broadtown Investment Company, a corporation	Shareholder and beneficiary under Life Policies	Neil S. McCarthy
	Dr. Arthur B. Allen et al.	Holders of Non-Can Policies	W. B. Etheridge
	David Lynn Openshaw et al.	Holders of Non-Can Policies	Delvy T. Walton
	Henry B. Senn	Holder of Non-Can Policy	Albert E. Coger
4139	Herbert Freston	Holder of Non-Can Policy	Herbert Freston
	Robert J. Webb and Philip M. Klutznick, for themselves and all other persons similarly situated	Holders of Non-Can Policies	Messrs. Jacob J. Lieberman and Aaron B. Rosenthal
	R. Rabinowitz	Holder of Non-Can and Life Policies	Lawler & Felix
	Roscoe R. Hess	Holder of Non-Can Policy	Roscoe R. Hess and David R. Rubin
4140	G. C. Parsons, J. A. Marvin and G. R. Snider, et al., on behalf of themselves and all other holders of Non-Cancellable Policies, and as members of a Protective Committee for Holders of Non-Cancellable Income Policies	Holders of Non-Can Policies	Messrs. Chapman, Snider, Duke & Landis, Hiram W. Johnson, Jr. Frank P. Doherty
	William H. Neblett	Holder of Life Policy	William H. Neblett, R. Dean Warner and LeRoy B. Lorenz

	Names of Interested Persons	Interest Alleged	Attorneys Representing
4141	Austin O. Martin	Holder of Non-Can Policy	Rex Hardy
	Rex Hardy	Holder of Non-Can Policy	Rex Hardy
	William A. Sullivan	Insurance Commissioner of the State of Washington	Ivan Merrick
	Arthur E. White	Holder of Non-Can Policy	Arthur E. White
4142	George I. Cochran et al.	Stockholders	Oscar Lawler and Harold Judson
	Wilbur A. Beckett et al.	Stockholders	Shattuck, Davis & Story
	Arthur D. Wunner	Former General Agent	Paul Overton
	C. N. Wesley et al.	Non-Can Policyholders	Latham, Watkins & Bouchard
	Wilbur G. Katz et al.	Holders of Non-Can Policies	Bell, Boyd & Marshall Newlin & Ashburn
4143	Carl C. Katleman et al., for himself and all others similarly situated	Holders of Non-Can Policies	Carl C. Katleman
	Andrew J. Copp, Jr. on his own behalf	Holder of Non-Can Policy	Andrew J. Copp, Jr.
	Ralph C. Hamlin	Holder of Non-Can Policy	Garnet C. Rainey
	Rowe Sanderson et al.	Non-Can Policyholders	Chapman & Chapman
	Robert Casamajor et al.	Non-Can Policyholders	Hahn & Hahn
	Ben S. Hunter	Life, Non-Can and Commercial Policyholder	Ben S. Hunter

4144	Names of Interested Persons	Interest Alleged	Attorneys Representing
	Clara M. Garunan et. al.	Allegedly a Non-Can Policyholder	M. W. Purcell
	John P. Oliver	Non-Can Policyholders	John P. Oliver
	Harold S. Cook, et al.	Stockholders' Protective Committee	Loeb, Walker & Loeb
	Edwin Janss et al	Policyholders' Committee representing commercial policyholders, non-can policyholders and life policyholders	William M. Rains
4145	E. A. Conway	Non-Can Policyholder, and as Secretary of State and Ex-Officio Commissioner of Insurance of the State of Louisiana, on behalf of all policyholders in that state	D. M. Ellison, Attorney for the Secretary of State of Louisiana
	Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel	On their own behalf and on behalf of each of them, and on behalf of all general agents and managers of The Pacific Mutual Life Insurance Company of California (each of said named interveners being a general agent, life policyholder, non-can policyholder, and stockholder	Cosgrove & O'Neal
4146	J. Parker Evans, on behalf of himself and all other holders of active life non-cancellable income policies issued in the State of Alabama who may wish to join with him in the proceeding	Non-Can Policyholder	A. A. Carmichael, Attorney-General of Alabama, and Frank E. Spain, Special Assistant Attorney-General of Alabama;

4147 and

Evidence both oral and documentary having been introduced and full opportunity having been afforded to all persons appearing either in person or by counsel and to all other persons interested herein to state, discuss and urge any and all objections they, or any of them, might have to the proposed rehabilitation and reinsurance agreement or to these proceedings, or to any or all of the matters or things herein adjudicated;
4148 and this court having heard and considered all objections and all evidence introduced and having considered the provisions of said proposed rehabilitation and reinsurance agreement and having duly read and considered the order permitting the performance of acts and the making of payments necessary to conserve and protect assets and to prevent the waste thereof made and entered herein by this court on August 17, 1936; and having duly read and considered that certain
4149 rehabilitation, sale and transfer of assets and reinsurance agreement dated July 23, 1936, and on file herein, more specifically referred to in said order of August 17, 1936; and having also considered all files, papers, records and proceedings herein; and the matter having been fully argued and the court being fully advised in the premises, and good cause appearing therefor,

It is hereby ordered, adjudged and decreed:

1. That notice of this hearing has been duly given under, pursuant to, and in accordance with

the terms of the order to show cause aforesaid; that such notice constitutes and constituted proper, practicable, reasonable, just and sufficient notice of the hearing herein; that all persons interested in respondent corporation, its properties, assets, or estate have been given and have had a right and a reasonable opportunity to appear and be heard upon the question of the fairness, justice, equity, feasibility and propriety of said proposed rehabilitation and reinsurance agreement and the plan embodied therein, and upon all phases of these proceedings, and upon each, all and every, the matters and things herein adjudicated.

2. That the document attached hereto, marked Exhibit "A," and made a part hereof, is a full, true and correct copy of the proposed rehabilitation and reinsurance agreement; that the execution thereof has been proposed by petitioner; that petitioner recommends the plan therein contained; and that said Exhibit "A" embodies the plan hereby approved by this court and is the agreement, the execution whereof is hereby approved by this court.

3. That all policyholders, creditors and stockholders of and all other persons interested in respondent corporation, its properties, assets, or estate are, by representation or otherwise, parties to the within proceedings, have been given proper and adequate notice of the hearing on the petition pursuant to which this order is entered, and ade-

4153 quate opportunity to be heard hereon and herein; and they are, and each of them is, bound by all proceedings taken herein, and more particularly by the terms of this order.

4. That adequate provision is made by the said rehabilitation and reinsurance agreement, Exhibit "A," for each and every class of policyholders, creditors and stockholders of respondent corporation and all other persons interested in respondent corporation, its properties, assets, or
4154 estate; that neither said agreement nor the plan therein embodied discriminates unfairly or illegally in favor of any class of policyholders, creditors, stockholders, or other persons interested in respondent corporation, its properties, assets, or estate; that said agreement and the plan therein embodied do, and each of them does, fairly and equitably protect and adjust the rights, obligations and liabilities of all persons concerned herein; and they do and each of them does provide
4155 for the removal of the causes which have made these proceedings necessary.

5. That the total value of the assets of respondent corporation, as of December 31, 1935, and as of July 22, 1936, was exceeded on said dates, and each of said dates, by the amount necessary to provide for its liabilities and for reinsurance of all of its outstanding risks, such reinsurance being estimated with respect to its life insurance risks at the rates prescribed in

section 986 of the Insurance Code of the state of California, and such reinsurance being estimated with respect to its disability insurance risks in accordance with standards properly prescribed by the Insurance Commissioner of the State of California which would provide adequate safeguards for its policyholders, creditors and the public. That on July 22, 1936, respondent corporation was in such condition that its further transaction of business would be hazardous to its policyholders and creditors and to the public.

6. That the properties, assets and estate of respondent corporation would be of substantially less value if they were sold separately or in separate units or parcels than if they were sold as a going concern; that respondent corporation had on July 22, 1936, intangible assets consisting of good-will, agency organization and going concern values which were and are of great value, to wit, of several million dollars; that the said rehabilitation and reinsurance agreement, Exhibit "A," is designed to accomplish the preservation and conservation of said intangible assets, and that the same do now exist and will hereafter continue to exist in the hands of the new company, described in said rehabilitation and reinsurance agreement.

7. That the plan embodied in said rehabilitation and reinsurance agreement, Exhibit "A," is feasible, and that operations under said agreement are feasible.

4159 8. That said rehabilitation and reinsurance agreement, and the plan embodied therein, are, and each of them is, fair, just and equitable.

9. That the said rehabilitation and reinsurance agreement, and the plan embodied therein, present and afford, and each of them presents and affords, a feasible method of providing, within a reasonable time, full restoration of the benefits under the non-cancellable income policies of respondent corporation to the extent that the
4160 payment of such benefits is not initially assumed by the new company, as described in said rehabilitation and reinsurance agreement.

10. That all policyholders and creditors of respondent corporation have been given and are afforded by said rehabilitation and reinsurance agreement a fair, just and timely opportunity to participate in the benefits thereof and in the plan therein embodied.

4161 11. That the acts of petitioner, as conservator, in organizing and subscribing to and acquiring the capital stock of Pacific Mutual Life Insurance Company, a California corporation, and in transferring to said corporation the sum of three million dollars ($3,000,000.00) out of the assets in his hands as such conservator in connection therewith, be and the same are hereby ratified, confirmed and approved.

12. That the transfer and conveyance heretofore made of the assets, properties, books and

4162 records of respondent corporation to Pacific Mutual Life Insurance Company be and the same are hereby ratified, confirmed and approved.

13. That said rehabilitation and reinsurance agreement, and each and all of the terms and conditions thereof, and the plan therein embodied are, and each of them is, hereby approved; that the proposed action of petitioner in executing and entering into said agreement is hereby approved; and that petitioner is hereby authorized and di-
4163 rected to execute and enter into an agreement in the form of Exhibit "A" attached hereto, and upon the terms and conditions therein contained.

14. That petitioner be, and he is hereby, authorized to transfer, convey, release, set over and assign to Pacific Mutual Life Insurance Company, in consideration of its execution of said rehabilitation and reinsurance agreement, and upon the terms therein contained, all of the assets, properties, books and records of respond-
4164 ent corporation, excepting only (a) the capital stock of Pacific Mutual Life Insurance Company held by petitioner, and (b) the rights or claims, if any, which respondent corporation may have against any of the present or past officers, directors, or employees, as such, of respondent corporation, or against any other person, firm, or corporation, by reason of or in connection with wrongful or illegal acts or omissions, if any, of any of said past or present officers, directors, or

employees, including rights or claims on any fidelity or surety bond or bonds given to or in favor of respondent corporation to secure the faithful performance by any of its said officers, directors, or employees of any of their duties as such.

15. That the Insurance Commissioner of the State of California, as conservator of respondent corporation, or, if he should hereafter be appointed liquidator of said corporation, as such liquidator, be and he is hereby authorized, without further order of this court, fully and faithfully to perform, carry out and discharge each and all of the obligations, terms, conditions and covenants on his part required to be performed under the terms of said rehabilitation and reinsurance agreement; and, either with or without further order of this court, to make, do, execute and deliver any and all such further or other acts, deeds and things by him deemed reasonably necessary or desirable to effectuate the intents and purposes of said rehabilitation and reinsurance agreement, and to assure and to confirm to Pacific Mutual Life Insurance Company, or its successors, all and singular the properties hereinbefore directed to be conveyed and released to said corporation, and to enable said corporation from and after the date hereof to conduct and continue to conduct a life and disability insurance business, as contemplated by said agreement.

4168 16. That this court, without relinquishing by these specific provisions any jurisdiction by it retained as a matter of law, do, and it does hereby, specifically retain and reserve jurisdiction of the within proceedings for the purpose of authorizing or approving any act of the Insurance Commissioner of the State of California done or to be done pursuant to or in accordance with this order, and for the purpose of making or entering, upon application of the Insurance Commissioner
4169 of the State of California or of Pacific Mutual Life Insurance Company, any order, decree, judgment, or ruling required, permitted, or requested to be done, made, or entered in connection with or pursuant to the terms of said agreement, or for the effectuation of the purposes thereof.

17. That in respect of all federal taxes finally determined to be due from The Pacific Mutual Life Insurance Company of California, the
4170 United States shall have the same legal right of priority and preference with respect to the payment of such taxes out of the assets of Pacific Mutual Life Insurance Company as it had against the assets of The Pacific Mutual Life Insurance Company of California had these proceedings not intervened; and that so much of said rehabilitation and reinsurance agreement as relates (a) to the foregoing priority and preference of the United States, (b) to the agreement of Pacific Mutual Life Insurance Company that

4171 the United States shall have the same remedies against it and its assets with regard to the collection of said taxes as the United States had against The Pacific Mutual Life Insurance Company of California; that no provision of said agreement shall be construed as limiting the operation of said provisions in respect of said taxes; that the assets of The Pacific Mutual Life Insurance Company of California be not so valued nor the amount of the reserves so rede-
4172 termined as to affect prejudicially the rights or remedies of the United States, and (c) to the agreement of all parties to said rehabilitation and reinsurance agreement that in consideration of the forbearance on the part of the United States at this time to enforce payment of its taxes, the right of the United States to enforce the provisions of said agreement shall be as full and complete as if the United States were named as a party thereto, be and the same is hereby specif-
4173 ically ratified, confirmed and approved. Subparagraph (b) of paragraph 15 of Exhibit "A" attached hereto is hereby referred to, embodied herein, and made a part hereof, as fully as if here set forth in full.

18. That Pacific Mutual Life Insurance Company be and it is hereby authorized forthwith, and without the necessity of any further order or authorization of this court, to conduct, and continue to conduct, the business of life and disability insurance as permitted by its articles of

incorporation and by the laws of the state of California, including the assumption or reinsurance, to the extent provided in said rehabilitation and reinsurance agreement, of policies of insurance made or written by respondent corporation, and including the execution of new policies of insurance, and also including the doing of any and all other acts and things by it deemed reasonably necessary or desirable in connection with the conduct and transaction of such business.

19. That petitioner and said Pacific Mutual Life Insurance Company be and they are authorized to do any and all things necessary, desirable, or proper to carry out the terms of said rehabilitation and reinsurance agreement, or to effectuate the purposes thereof, in the state of California or elsewhere.

20. That respondent corporation, its officers, directors, stockholders, agents and employees be and they are hereby directed, at any and all times and from time to time, to cooperate with and assist petitioner and said Pacific Mutual Life Insurance Company in the consummation and effectuation of said rehabilitation and reinsurance agreement and the purposes thereof, by the execution of such documents of transfer or conveyance, or otherwise, and by the doing of such acts in connection with said agreement or in connec-

4177 tion with any of the assets heretofore belonging to respondent corporation, or assets into which the same, or any of the same, may have been or may hereafter be converted, as Pacific Mutual Life Insurance Company may hereafter reasonably request or require for the purpose of effectuating the intents and purposes of this agreement or of this order; and that any and all injunctions and restraining orders heretofore entered herein
4178 are hereby modified to such extent as may be necessary to permit compliance with this order.

21. That Pacific Mutual Life Insurance Company shall, upon the production of an instrument of conveyance from petitioner, or a certified copy thereof, be let into the possession of any and all property conveyed, assigned, or transferred pursuant thereto, and shall thereafter hold, possess and enjoy such property, and each and every part
4179 and parcel thereof, free from any charge or claim of petitioner, or of respondent corporation, or of any of its policyholders, creditors, or stockholders, or of any other person or persons interested in respondent corporation, its properties or estate, or of any person claiming by, through, or under them, or any of them, except insofar as said property may, prior to the date of such conveyance, have been subject to any lien, charge,

or incumbrance, legal, or equitable, superior to the title of petitioner and of respondent corporation; provided, however, that nothing herein contained shall be deemed to affect, minimize, or interfere with any right or rights conferred under, growing out of, or assured by said rehabilitation and reinsurance agreement.

22. That all persons, firms and corporations be and they are hereby forever barred and enjoined from making hereafter any complaint in respect of the said rehabilitation and reinsurance agreement, or any provision or provisions thereof, except as in said agreement specifically permitted or by appeal from this order; and the prosecution by any person, firm, or corporation of any proceeding or proceedings of whatsoever kind or nature, for the purpose of attacking this order, or any conveyance or transfer made pursuant hereto (other than as permitted by said rehabilitation and reinsurance agreement or by appeal from this order), or seeking to attach any liability of or on account of respondent corporation to Pacific Mutual Life Insurance Company (except as and to the extent the same may be assumed under the terms of said agreement), or to its properties or assets, or any of its properties or assets (except as and to the extent such lia-

4183 bility was prior to the date hereof secured by lien or charge upon such property or assets superior to the title of petitioner and of respondent corporation), be and it is hereby forever enjoined.

23. That any and all acts, things, or transactions performed, done, or entered into by petitioner in the performance of and within the intent and meaning of the direction of this court in the order made and entered herein on August
4184 11, 1936, directing petitioner to conduct, manage, transact and operate the business and affairs of The Pacific Mutual Life Insurance Company of California as a going insurance business, and to do any and all things petitioner might deem necessary and appropriate for that purpose, be and the same are hereby ratified, confirmed and approved.

4185 24. That that certain order permitting the performance of acts and the making of payments necessary to conserve and protect assets and to prevent the waste thereof made and entered herein by this court on August 17, 1936, be and the same is hereby ratified, confirmed and approved.

Dated: December 4th, 1936.

HENRY M. WILLIS,
Judge.

4186

Exhibit "A"

Rehabilitation and Reinsurance Agreement

This Agreement, made and entered into as of the 22nd day of July, 1936, between Pacific Mutual Life Insurance Company, a California corporation, and Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, as conservator of The Pacific Mutual Life Insur-
4187 ance Company of California, a California corporation,

Witnesseth:

That for and in consideration of the covenants and agreements hereinafter contained, the parties hereto agree as follows:

Definitions

(1) "Commissioner" shall mean Samuel L.
4188 Carpenter, Jr., in his capacity as Insurance Commissioner of the State of California, or his successors in office as such Commissioner.

"Conservator" shall mean Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, in his capacity as Conservator of The Pacific Mutual Life Insurance Company of California, or his successors in office as such Conservator.

"Old Company" shall mean The Pacific Mutual Life Insurance Company of California.

4189 "New Company" shall mean Pacific Mutual Life Insurance Company.

"The Court" shall mean the Superior Court of the State of California, in and for the County of Los Angeles.

"Non-Can Policies" shall mean those policies of the Old Company usually known as its "Non-Cancellable Income Policies" including the Aggregate form thereof.

4190 "States" when referred to a governmental subdivision shall be deemed to include Territories and the District of Columbia.

"Properties of the Old Company" shall mean all books, records, property, real and personal, tangible and intangible, and all other assets of every kind, character, and description whatsoever, and wheresoever situated, owned by the Old Company at the time of the appointment of the Conservator which shall not have been applied
4191 by him against his subscription for stock of the New Company or disposed of by him in the due course of his administration as Conservator, plus all property acquired by the Conservator and the income therefrom collected by him, except (a) the stock of the New Company held by him, and (b) rights or claims, if any, of whatsoever nature which the Old Company may have against any of the present or past officers, directors, or employees, as such, of the Old Company, or against any other person, firm, or corporation, by reason

4192 of or in connection with wrongful or illegal acts or omissions, if any, of any of the past or present officers, directors, or employees of the Old Company, including rights or claims on any fidelity or surety bond or bonds given to or in favor of the Old Company to secure the faithful performance by any of its officers, directors, or employees of any of their duties as such.

"Effective Date of this Agreement" shall mean July 22, 1936, at the hour of one o'clock P. M.
4193 Pacific Standard Time.

"Liquidator" shall mean any person hereafter appointed Liquidator of the Old Company in the proceeding now pending in the Court entitled "Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California vs. The Pacific Mutual Life Insurance Company of California," and bearing number 404673 in the records of the Court; and any person succeeding to the office of such Liquidator.
4194

Transfer of Assets

(2) The Conservator agrees, by appropriate instrument of conveyance, to sell, assign, convey, release, transfer, set over, and deliver, to the New Company, the properties of the Old Company; and to execute any and all further documents or instruments as may be reasonably necessary to effectuate and confirm the title of the New Company thereto.

4195 The Conservator shall not be required to make manual delivery of any cash or securities deposited by the Old Company with any governmental authority as a condition to the conduct of its business, nor to make manual delivery of any premiums or other assets which are in the possession of receivers of the Old Company or its assets or business, or in the possession of other governmental authorities, in states other than California; but in connection with receivership
4196 or other proceedings in such other states, the Conservator shall do any and all things proper for him to do to bring about and accomplish the delivery and transfer of such premiums or other assets to the New Company.

The Conservator shall transfer and deliver to the New Company the full amount of all premiums on any policy reinsured and assumed hereunder which have been paid to the Conservator on or after the effective date of this agreement,
4197 and the New Company shall credit the holder of such policy with the payment of such premiums accordingly, subject to repayment as hereinafter provided in the event the holder of such policy shall elect not to accept such reinsurance and assumption by the New Company. If any policy holder of the Old Company whose policy may be reinsured or assumed hereunder shall have paid his premium thereon to the Conservator subsequent to the effective date of this agreement, and shall thereafter elect to reject rein-

surance and assumption of his such policy hereunder; and if the Court shall direct the Conservator or Liquidator to return said premium (or the net premium or premiums less charge for insurance service or collection charge or otherwise); then and in those events the New Company shall repay to the Conservator or Liquidator, on demand, said premium, or so much thereof as the Court may have ordered returned by the Conservator or Liquidator, as aforesaid.

Pursuant to the provisions of Section 1043 of the Insurance Code of the State of California it is agreed that subsequent to the effective date of this agreement, and for such period of time as the Commissioner may determine, no investment or reinvestment of the assets of the Old Company shall be made without first obtaining the written approval of the Commissioner.

Reinsurance and Assumption of Policies Other Than Non-Can Policies.

(3) The New Company does hereby reinsure and assume, as of the effective date of this agreement, with the exception hereinafter provided, the liability of the Old Company and of the Conservator under all life, endowment, annuity and term policies and contracts of insurance, and all other policies and contracts of insurance, including, without limiting the same to, health and accident benefits, waiver of premium disability benefits, permanent and total disability

benefits, home office employees disability benefit plan, and all supplementary contracts, annuity contracts, and all reinsurance contracts, issued or assumed by the Old Company and outstanding and in force on the books and records of the Old Company at the effective date of this agreement, or issued by the Conservator in his name as Conservator, in the name of the Old Company, or in the name of the New Company, subject, however, to any and all defenses, offsets, counter-claims, cross-complaints, and rescission rights against said policies or contracts or against any claims and actions thereon, which would have been available to the Old Company or the Conservator as aforesaid had this agreement not been made; provided, however, that no outstanding Non-Can Policies are reinsured or assumed under this paragraph, and all of such policies are hereby expressly excepted from the obligations of the New Company under this paragraph.

Reinstatement of Lapsed Policies

(4) The New Company will reinstate any policies heretofore issued, assumed, or reinsured by the Old Company, which are not excepted from the obligations of the New Company contained in the foregoing paragraph and which at the effective date of this agreement, by their terms, were entitled to reinstatement, provided that all requirements necessary to procure a re-

4204 instatement of said policies under their terms are fulfilled to the satisfaction of the New Company.

The New Company will also reinstate, during the lifetime of the insured and provided the insured is not in such condition as to be eligible for benefits under the policy, without evidence of insurability, any of the policies reinsured and assumed under Paragraph (3) hereof, which have lapsed since the effective date of this agree-
4205 ment, upon written application therefor by the insured and the payment of all premiums in arrears, if such application is made and premiums are paid within seventy-five (75) days after the entry of the order of the Court approving this agreement. Upon the reinstatement of such lapsed policy it shall, for all purposes, be treated (but only from and after the date of reinstatement) the same as if it had been in force on the effective date of this agreement and be subject
4206 to the terms and conditions of this agreement.

Payment of Policy Claims Other Than Claims on Non-Can Policies.

(5) The New Company will pay in full, in accordance with the terms and conditions of all policies including annuities under which claims shall have been or may be made, and whether or not the claims arose or matured prior or subsequent to the effective date of this agreement, all policy claims against the Old Company (ex-

cept claims on Non-Can Policies) including, without limiting the same to, claims for death benefits, matured endowments, annuity payments, permanent total disability and premium waiver benefits, accident and sickness benefits, payments under policy settlement agreements, policy dividends left at interest with the Old Company prior to the effective date of this agreement, and payments under all other matured contracts under which the proceeds of policies and contracts were left with the Old Company prior to the effective date of this agreement; and the New Company will assume the liabilities of the Old Company with respect to deposits, moneys left with the Old Company at interest, overpayments, duplicate payments, or advance payments of premiums, and return of premiums arising from cancellations prior to July 22, 1936; all subject, however, to any and all defenses, offsets, counter-claims, cross-complaints, and rescission rights against any such claim or claims which would have been available to the Old Company had this agreement not been made.

Participating Department

(6) The New Company agrees to establish a separate department for Participating Life Insurance, and to allocate thereto specifically or in tenancy in common that portion of the assets conveyed to it by the Conservator (other than

the Three Million Dollars ($3,000,000.) transferred to the New Company for its capital stock) in the ratio in which assets appearing on the books of the Life Department of the Old Company were credited to the Participating Life Department of the Old Company on its books as of July 22, 1936, subject to such changes as may have been made therein in the ordinary course of the operations of the business of the Old Company by the Conservator, including the writing of the new participating life insurance by the New Company, and except assets of the book value of One Million. Seven Hundred Ninety-Two Thousand, One Hundred Eighteen Dollars and Ninety-seven Cents ($1,792,118.97) transferred by the Conservator to the Accident and Health Department.

The said Three Million Dollars ($3,000,000.) transferred to the New Company for its capital stock constitutes and shall constitute the capital and paid-in surplus of the New Company; and neither the Participating Department nor the holders, present or future, of participating policies shall have any right, claim, or interest therein prior to other Departments or their policy holders. The said assets transferred to the Accident and Health Department are and shall be the property of the said Department free from any claim of the Participating Department, or the holders, present or future, of participating policies.

4213 It is hereby agreed by the New Company, and all persons accepting reinsurance hereunder do by such acceptance agree, that the assets of the Participating Department, and its business, and the receipts in respect of said business shall, subject to the limitations hereinafter contained, be appropriated and held as absolutely for the benefit of and to the security of the policies and policy holders of that Department as though they belonged to a mutual insurance company carry-
4214 ing on no other business; and, to the extent of the reserves from time to time required on the policies and policy liabilities of said Department, in priority to the claims of all other creditors, past, present, and future, of said Department.

The Board of Directors of the New Company shall, from time to time, and at least annually, transfer from the Participating Department to the funds of the New Company available for its general corporate purposes, such sums as it
4215 may deem available, if any, but in no event exceeding in the aggregate ten percent. (10%) of the net profits (before dividends, and without charging thereto cost of acquisition of new business) then accrued on policies of the Old Company reinsured hereunder earned subsequent to the effective date of this agreement (whether arising from mortality savings, investment income, expense savings, or otherwise, and after taking into consideration gains or losses on the sale or other disposition of assets, and such rea-

sonable adjustment in the value of any assets, or reserves for anticipated losses thereon, or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination of the New Company). Any portions of such ten percent. (10%) not so transferred at any time shall be cumulative, and shall be transferred from time to time thereafter, from profits, and subject to limitations, as aforesaid. Any statute of limitations which might apply to bar the right to require such transfer is hereby waived.

Any surplus from time to time existing in said Department (whether arising from mortality savings, investment income, expense savings, or otherwise, and after taking into consideration gains or losses on the sale or other disposition of assets, and such reasonable adjustments in the value of any assets, or reserves for anticipated losses thereon, or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination of the New Company), may be used only for the following purposes:

(a) The payment of policy dividends to policy holders in accordance with the terms of their

policies and in such amounts as the Board of Directors of the New Company may from time to time consider proper and advisable, taking into consideration the amount of earnings and other relevant data.

(b) For the payment of any of the costs and expenses of operation of said Department, including the acquisition and carrying of new business written by said Department in such amounts as the Board of Directors of the New Company may from time to time deem reasonably necessary or desirable.

(c) Necessary working capital may be supplied to said Department from time to time from any moneys available for general corporate purposes; and the Board of Directors of the New Company shall, when in their discretion it shall appear practicable, in subordination to the rights of the policy holders of said Department, and from surpluses accumulated in said Department after the payment of reasonable and appropriate dividends to the policy holders thereof, as provided in subparagraph (a) of this paragraph 6, restore the amount of the working capital so supplied, together with interest thereon at the average rate of interest earned by the New Company during the period, to the sources from which it came.

(d) For the payment into funds of the New Company available for its general corporate pur-

poses of a portion (not including ten percent. (10%) of the net earnings of the participating policies of the Old Company reinsured hereunder, as hereinbefore provided. In computing dividends payable to participating policy holders, any amounts paid under this subparagraph shall be charged against said policies reinsured and no part thereof shall be charged against participating policies issued by the New Company.

(e) Any remaining portion of said surplus shall be kept separate and distinct from the funds of all other departments; and shall be held as absolutely for the security of and the benefit of the policy holders of the Participating Department as though it belonged to a mutual company carrying on no other business.

Non-Participating Department

(7) The New Company further agrees to establish a separate department for its Non-Participating Life Insurance, and to allocate thereto specifically or in tenancy in common that portion of the assets conveyed to it by the Conservator in the ratio in which assets appearing on the books of the Life Department were credited to the Non-Participating Department of the Old Company on its books as of July 22, 1936, subject to such changes as may have been made therein in the ordinary course of the operation

of the business of the Old Company by the Conservator, including the writing of new non-participating life insurance by the New Company.

It is hereby agreed by the New Company, and all persons accepting reinsurance hereunder do by such acceptance agree, that the assets from time to time held in said Non-Participating Department shall, to the extent of the reserves from time to time required on the policies and policy liabilities of said Department, be appropriated, and held as absolutely for the benefit of and to the security of the policies and policy holders of said Department as though they belonged to a company carrying on no other business, and in priority to the claims of all other policy holders or creditors, past, present, or future, of the New Company.

Any surplus from time to time existing in said Non-Participating Department (whether arising from mortality savings, investment income, expense savings, or otherwise, and after taking into consideration gains or losses on the sale or other disposition of assets and such reasonable adjustments in the value of any assets, or reserves for anticipated losses thereon, or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment upon the order of the Commissioner made in the course of or as a re-

sult of any examination of the New Company) may from time to time be used for the general corporate purposes of the New Company subject to any express limitations herein contained.

Accident and Health Department

(8) The New Company further agrees to establish a separate department for its Accident and Health Insurance (including Non-Can Policies), and to allocate thereto the assets conveyed to it by the Conservator which had been credited to the Accident and Health Department of the Old Company on its books as of July 22, 1936, and those assets of the book value of One Million, Seven Hundred Ninety-two Thousand, One Hundred Eighteen and 97/100 Dollars ($1,792,118.97) heretofore transferred by the Conservator to the Accident and Health Department, subject to such changes as may have been made therein in the ordinary course of the operation of the business of the Old Company by the Conservator, including the writing of new accident and health insurance by the New Company.

It is hereby agreed by the New Company, and all persons accepting reinsurance hereunder do by such acceptance agree, that the assets

4231 from time to time held in said Department shall, to the extent of the reserves from time to time required on the policies and policy claim liabilities of said Department, be appropriated for the benefit of and to the security of the policies and policy claim liabilities hereof in priority to the claims of all other policy holders or creditors, past, present, or future, of the New Company.

Any surplus from time to time existing in
4232 said Department (after taking into consideration gains or losses on the sale or other disposition of assets and such reasonable adjustments in the value of any assets, or reserves for anticipated losses thereon or otherwise, as the Board of Directors of the New Company may from time to time establish, subject only to readjustment upon the order of the Commissioner made in the course of or as a result of any examination
4233 of the New Company) may from time to time be used for the general corporate purposes of the New Company subject to any express limitations herein contained.

Inter-Departmental Transactions

(9) Neither anything in this agreement contained, nor the separating of the business of the New Company into Departments, as aforesaid,

shall be deemed to prevent the apportionment among Departments of their fair and equitable shares of expenses; nor the exchange, upon a fair and equitable basis, of assets between Departments; nor reinsurance between Departments in the ordinary course of business and at customary reinsurance rates. Any determination by the Board of Directors of the New Company with respect to any such apportionment or exchange shall be final and conclusive upon all persons interested, subject only to adjustment upon order of the Commissioner made in the course of or as a result of any examination of the New Company.

Reinsurance and Assumption of Non-Can Policies.

(10) The New Company does hereby reinsure and assume, as of the effective date of this agreement, the liability of the Old Company or of the Conservator, whether incurred in his name as Conservator, in the name of the Old Company, or in the name of the New Company under all Non-Can Policies issued by the Old Company and outstanding and in force on the books and records of the Old Company at the effective date of this agreement, subject, however,

4237 to the terms, conditions, and limitations, and only to the extent, hereinafter specifically provided; and subject, further to any and all defenses, offsets, counterclaims, cross-complaints, and rescission rights against such policies or any claims and actions thereon which would have been available to the Old Company or to the Conservator as aforesaid had this agreement not been made.

4238

Terms, Conditions, Limitations, and Extent of Reinsurance and Assumption of Non-Can Policies.

(11) The New Company does not assume any liability for monthly benefits on Non-Can Policies reinsured hereunder unless the disability commenced prior to the effective date of this agreement and notice of claim was filed in ac-
4239 cordance with the terms of the policy, and in no event later than twenty (20) days after the effective date of this agreement, except to the extent of the following percentages of the monthly disability benefits originally provided under said policies according to the following premium classes respectively (but subject to restoration of monthly benefits as hereinafter provided):

4240

	Prem. Class.	Issued Under Rate Books	Policy Forms	Issued Under Policy Numbers	Percentage of Original Monthly Benefit Assumed By New Company
	1918	A1445-A1445Z A1445Y-A1445X A1445W	A231 to A288 inc.	2658601 to 2698150 4600501 to 4628000 4711101 to 4712000 4730901 to 4731100	20%
4241	1921	A1687-A1687Z A1687Y-A1687X A1687W	A291 to A294 inc. A365-A366	4628001 to 4700000	35%
	1926	A1958-A1958Z A1958Y	A382-A383 A386-A387 A387Z	5500001 to 5600000	45%
	1929	A2293	A382-A383 A386-A387 A387Z	5600001 to 5620000	55%
	1931	A2367	A753 to A756 inc. A763-A764	5620001 to 5635000	65%
4242	1932	A2432-A2432Z A2499	A775 to A780 inc.	5635001 to 6000000	90%
		A2499	Aggregate A1216 to A1221 inc.	6500001 to 7000000	90%
	1935	A2567	Aggregate A1226 to A1229 inc.	7000001 to 7100000	90%

NOTE: All of the above mentioned Rate Books are Rate Books issued b the Old Company and copies are on file at the office of the New Company 523 West Sixth Street, Los Angeles, California, and in the offices of the Insu ance Commissioners or similar public officials of each state in which the Ol Company has been transacting insurance business, except in states where suc filing is not required by law.

4243 Notwithstanding the foregoing limitation on the obligation of the New Company to make monthly disability payments at such rates on such policies, to be entitled to the reinsurance and assumption of his Non-Can Policy by the New Company as aforesaid, the policy holder shall be obligated to continue to make premium payments as originally provided in his policy.

Reinstatement of Lapsed Non-Can Policies

4244 (12) The provisions of paragraph 4 of this agreement with respect to reinstatement of lapsed policies other than Non-Can Policies shall apply to Non-Can Policies, subject to the terms, conditions and limitations contained in paragraphs 10 and 11 hereof.

Payment of Claims on Non-Can Policies in Respect of Disabilities Existing Prior to Effective Date of this Agreement

4245 (13) The New Company shall be obligated to pay all disability benefits under Non-Can Policies for disabilities commencing prior to the effective date of this agreement with respect to which claims or notices of claims were duly filed in accordance with the terms of such policies, and in any event not later than twenty (20) days after the effective date of this agreement, and all payments under settlement agreements made by the Old Company wit' claimants under such

policies, without any deduction or limitation whatsoever, but subject to all of the terms and provisions of such Non-Can Policies, and subject to the terms of any such settlement agreements; and subject, further, to any and all defenses, offsets, counter-claims, cross-complaints, and rescission rights against any such claim or claims, which would have been available to the Old Company or to the Conservator as aforesaid had this agreement not been made.

Restoration of Benefits under Non-Can Policies

(14) The Board of Directors of the New Company shall from time to time transfer from the funds of the New Company available for its general corporate purposes to a special fund for the restoration of benefits under Non-Can Policies in such manner as the Board of Directors with the approval of the Commissioner may from time to time determine, such amounts as said Board of Directors in its discretion shall determine to be not reasonably required for the reasonable, proper and profitable conduct of the operations of the New Company as a going concern. At time of any examination of the New Company by the Commissioner, the Commissioner may require the transfer of additional funds to such special fund, to the extent such additional funds available for general corporate purposes are in his opinion available without interfering with the proper and profitable conduct of

the business of the New Company as a going concern.

The moneys and other assets from time to time held in such special fund shall be used by the New Company, with the approval of the Commissioner, and in such manner as he may from time to time require, for the purpose of paying additional disability benefits to holders of Non-Can Policies then, thereafter, or theretofore entitled thereto, in excess of the amounts required to be paid under paragraph 11 hereof, to the end that the benefits originally provided in said Non-Can Policies as written may eventually be fully paid, including eventual full payment of benefits becoming due prior to the time of such restoration, with interest on deferred restoration payments of such benefits at the rate of three and one-half percent. (3½%) per annum. The extent and manner of the restoration so required or approved by the Commissioner shall be binding upon all holders of Non-Can Policies, and all other persons interested therein.

The New Company may at any time, with the approval of the Commissioner, transfer all of such special fund to the reserves for Non-Can Policies, and, with the approval of the Commissioner, may fully assume and reinsure all Non-Can Policies hereby partially and conditionally reinsured, to the full amount thereof and in accordance with the terms thereof as written; and

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4252 if the Commissioner at the time of any examination of the New Company shall determine that in his opinion the amount of such special fund is sufficient to permit the establishment therefrom of adequate reserves for the full reinsurance of such Non-Can Policies, he may require such transfer and full reinsurance.

Upon such full reinsurance with the approval of or in accordance with the requirements of the Commissioner, the benefits on Non-Can Poli-
4253 cies shall be deemed fully restored.

After the benefits on Non-Can Policies shall have been fully restored, the said special fund shall be abolished, and any assets remaining therein at that time shall be available for the general corporate purposes of the New Company.

The New Company shall be under no obligation to pay or restore the full benefits under
4254 Non-Can policies as originally provided therein, except in the manner and to the extent hereinbefore described; provided, that if title to all or substantially all of the assets of the Accident and Health Department of the New Company shall hereafter be transferred, by voluntary act (other than by statutory merger or consolidation) or by operation of law, to any person who does not in connection with such transfer assume all of the obligations of the New Company to holders of Non-Can Policies, including obli-

4255 gations to restore the benefits thereunder in substantially the manner in this paragraph 14 provided, then and in that event the New Company will be deemed to have fully reinsured and assumed all of the Non-Can Policies, including the obligation to pay in full all installments of the disability benefits originally provided to persons theretofore entitled thereto.

Assumption of Claims against Old Company

4256 (15) The New Company hereby assumes and agrees to pay in full:

(a) All costs and expenses of the Conservator, including attorney's fees fixed and approved as required by law.

(b) All Federal taxes finally determined to be due from the Old Company. The United States shall have the same legal right of priority and preference with respect to the payment of
4257 such taxes out of the assets of the New Company as it had against the assets of the Old Company had these proceedings not intervened, and the New Company agrees that the United States shall have the same remedies against it and its assets with regard to the collection of such taxes as the United States had against the Old Company. No provision of this agreement shall be construed as limiting the operation of the provisions of this subparagraph; nor shall the assets of the Old Company be so valued or the amount

of the reserves so redetermined as to prejudicially affect the rights or remedies of the United States. In consideration of the forbearance on the part of the United States at this time to enforce payment of its taxes, all parties hereto agree that the right of the United States to enforce the provisions of the agreement shall be as full and complete as if the United States were named a party hereto.

It is agreed that the foregoing subparagraph (b) shall be embodied in and become a part of the Court's decree of confirmation.

(c) Taxes legally due from the Old Company to any State of the United States, to any County, or to any political subdivision.

(d) Wages, salaries, and pensions legally due to persons employed by the Old Company for services rendered, and current bills and expenses, other than insurance liabilities, in connection with the operation of the business of the Old Company, incurred prior to July 22, 1936, and remaining unpaid, subject of course to any defenses the Old Company may have had thereto.

Assumption of Claims against Conservator

(16) The New Company agrees to indemnify the Conservator against any and all claims and liabilities incurred by him in his capacity as Conservator in connection with the operation of the business of the Old Company,

whether in his name as Conservator, in the name of the Old Company, or in the name of the New Company.

Assumption of Claims against Liquidator

(17) In the event the Commissioner shall hereafter be appointed Liquidator of the Old Company, the New Company agrees to assume, and does hereby assume and agree to pay, all costs and expenses of such Liquidator, including attorney's fees, fixed and approved as provided by law. The New Company further agrees to pay, and does hereby agree to pay to the Liquidator for payment to claimants an amount equal to the sum of all claims against the Old Company filed with the Liquidator and finally allowed; provided, however, that the New Company shall not be required to make any payment or payments on account of any claims so filed with the Liquidator except to the extent and in the manner hereinafter provided (but the New Company, with the consent of the Commissioner, may waive the foregoing limitation and anticipate any such payments):

(a) The New Company will, as of the effective date of this agreement, with the approval of or in accordance with the requirements of the Commissioner, establish reserves against all policies and policy liabilities of the Old Company subject to assumption or reinsurance hereunder

(but, with respect to Non-Can Policies, only to the extent described in paragraphs 11 and 13 hereof). If any policy holders or policy claimants shall elect to reject assumption and reinsurance hereunder, the New Company agrees to pay to the Liquidator, immediately after the time for filing claim with said Liquidator shall have expired, an amount equal to the reserves so originally established against their policies or claims.

(b) Whenever, pursuant to the provisions of paragraph (14) hereof, any sums are transferred to the special fund for the restoration of benefits under Non-Can Policies, the New Company shall pay to the Liquidator a further sum of money bearing the same ratio to the moneys so transferred as the Non-Can Policies (evaluated as hereinafter provided) whose holders have rejected reinsurance hereunder and upon which claims have been filed in the liquidation proceedings as aforesaid, bear to the Non-Can Policies (evaluated as hereinafter provided) whose holders have accepted reinsurance hereunder.

Until such time as the measure of the claims, to the allowance of which holders of Non-Can Policies who file their claim in liquidation proceedings under the laws of the State of California are entitled, shall have been determined to the satisfaction of the Liquidator and he shall

4267 so notify the New Company in writing, Non-Can Policies shall, for the purpose of this sub-paragraph, be evaluated on the basis of the percentage established by paragraph 11 hereof of their monthly benefit originally provided, whether or not the holders thereof have accepted reinsurance hereunder.

When the measure of the claim to the allowance of which holders of such policies are entitled, as aforesaid, shall have been determined to
4268 the satisfaction of the Liquidator, and he shall so notify the New Company in writing, Non-Can Policies shall thereafter be evaluated for the purposes of this subparagraph, on the basis of allowable claim, whether or not the holders thereof have accepted reinsurance thereunder; but subject to readjustment as hereinafter provided in case of any final determination by the courts of California of any other measure.

4269 In the event payments have been made under any evaluation which is later altered as hereinbefore provided, a recomputation shall be made; and if as a result thereof it appears that there has been an overpayment to the Liquidator, he shall immediately refund to the New Company the amount of such overpayment; but if as a result of such recomputation it shall appear that there has been an underpayment to the Liquidator, the New Company shall adjust such underpayment solely out of funds available for its

4270 general corporate purpose, in the manner and upon the terms provided in paragraph 14 hereof for the creation of the special fund where referred to, but in priority to the claims of such fund.

(c) Any remaining amount necessary to pay and discharge the claims as aforesaid shall be paid at the time benefits under the Non-Can Policies are fully restored.

4271 (d) The aggregate of the payments to be made in subparagraphs (a), (b), and (c) hereof, shall not exceed the full amount of claims finally allowed in the Liquidation proceedings as aforesaid. Any moneys paid hereunder and remaining in the hands of the Liquidator after all claims filed with him and finally allowed have been paid, shall be by him returned to the New Company.

(18) Any payments made by the New Com-
4272 pany to the Liquidator under the provisions of paragraph 17 hereof may be made in cash or in securities or other assets satisfactory to the Liquidator taken at a valuation satisfactory to him. If payment is made otherwise than in cash, the Liquidator may, at any time, return any of such securities or other assets to the New Company at the valuation at which the same were taken, and the New Company shall substitute therefor cash or other securities or assets as aforesaid.

4273 Proceeds of Assets Held By Conservator or Liquidator

(19) The conservator, or, if the Commissioner is hereafter appointed Liquidator of the Old Company, such Liquidator, shall proceed in such manner and at such time as he deems proper, subject to the provisions of paragraph 20 hereof, to realize upon the assets still held by him as Conservator or as such Liquidator.

4274 In consideration of the various covenants of the New Company herein contained, and for the purpose of protecting holders of Non-Can Policies and of assuring an equitable division of the assets in liquidation among all policy holders and creditors of the Old Company, the Conservator agrees, for himself and for the Liquidator as his successor in title, that the proceeds of any of such assets (other than assets received under the provisions of paragraph (17) hereof) which may 4275 hereafter be received by him (or by the Liquidator as his successor in title) shall be used in the manner and only in the manner hereinafter in this paragraph 19 described; and a lien or charge is hereby established upon said proceeds accordingly:

(a) Said proceeds and any part thereof may be used by the Conservator or Liquidator for the payment of any of his costs or expenses of administration, including attorney's fees fixed and approved as provided by law; and any claims

4276 having preference in the liquidation proceedings by the laws of the United States or by the laws of the State of California; and thereupon the obligation of the New Company to pay such costs, expenses, or claims shall be released pro tanto.

(b) In the event benefits under Non-Can Policies shall not theretofore have been fully restored as provided in paragraph 14 hereof, a portion of the remaining proceeds (but not exceeding the amount required to provide complete
4277 restoration of the benefits under Non-Can Policies) in the ratio which exists between the Non-Can Policies (evaluated as provided in subparagraph (b) of paragraph 17 hereof) whose holders have accepted reinsurance hereunder, and all Non-Can Policies (evaluated as provided in subparagraph (b) of paragraph 17 hereof), whether their holders have accepted reinsurance, or have rejected reinsurance hereunder, and have filed claims in the liquidation proceedings, shall be
4278 paid to the New Company, and by it transferred to the special fund described in paragraph 14 hereof.

In the event payments have been made hereunder under any temporary evaluation which is later altered as hereinbefore permitted, a recomputation shall be made; and if as a result thereof, it appears that there has been an underpayment from the Liquidator, he shall immediately adjust such underpayment from funds in

his hands; but if as a result of such recomputation it shall appear that there has been an overpayment from the Liquidator, the New Company shall repay to the Liquidator from the special fund established pursuant to paragraph 14 hereof when and as there are sufficient moneys therein, (but in priority to the rights of holders of Non-Can Policies who have accepted reinsurance hereunder to restoration of their benefits) the amount of such overpayment.

(c) Any portion of such proceeds remaining after making the payments described in subparagraphs (a) and (b) hereof shall be used to pay and discharge claims filed with the Liquidator and finally allowed.

(d) Any portion of such proceeds remaining after making the payments described in subparagraphs (a), (b) and (c) hereof shall be paid to the New Company for the purposes of the special fund described in paragraph 14 hereof, to the extent the same may be required to provide full restoration of the benefits under Non-Can Policies.

(e) Any portion of such proceeds remaining after making the payments described in subparagraphs (a), (b), (c) and (d) hereof shall be disposed of by the Liquidator in the manner provided by law.

4282 Mutualization and Disposition of Stock of New Company

(20) Neither the Conservator, nor, if one be appointed, the Liquidator, of the Old Company, shall dispose of any of the stock of the New Company except as follows:

(a) At any time between July 1, 1946, and January 1, 1948, and thereafter so long as the Conservator or a Liquidator of the Old Company
4283 may continue to hold any or all of said stock, ten percent (10%) of the holders of participating policies of life insurance entitled to vote at a policy holders' election on a proposal for voluntary mutualization of the New Company, whether those reinsured hereunder or those issued by the New Company (each policy holder for this purpose being regarded as one person regardless of the number of policies owned or amount of insurance held) may request the New
4284 Company to create an Appointing Committee as hereinafter provided to exercise the duties and functions hereinafter specified in respect of a proposed voluntary mutualization of the New Company, in accordance with the laws of the State of California in effect at the time of said request, or, if said laws then so permit, of any one or more departments thereof. Such request shall specify the department or departments of the New Company desired to be mutualized.

4285 Upon the receipt of such request the New Company shall create an Appointing Committee consisting of the then President of the Association of Life Insurance Presidents, the President of Leland Stanford Jr. University, and the Provost of the University of California at Los Angeles, or persons occupying similar positions if their or any of their titles shall have been changed. In the event any one or more of such persons shall refuse or be unable to act, the re-
4286 maining member or members shall fill the vacancy or vacancies thereby created by their appointment in writing of another person or persons of similar position and standing. If all of said persons refuse or are unable to act, the Court or any Judge thereof shall, on the application of the Commissioner, designate an Appointing Committee consisting of three (3) persons of similar position and standing. Said Appointing Committee, acting through not less than a ma-
4287 jority of its members, shall designate a Price Determination Committee of not less than three and not more than five (5) persons skilled in matters of insurance company valuation, which committee, acting through not less than a majority thereof, shall determine whether in their opinion the proposed voluntary mutualization of the New Company, or of the department or departments thereof specified in said request can then be practicably accomplished having due re-

gard to the interests of all persons interested in the New Company. If it be determined that such mutualization is not then practicable no further steps shall be taken in connection with a possible mutualization of the New Company under the provisions of this subparagraph until at least six months after the date of such determination. If in the opinion of a majority of the members of the committee such mutualization is then practicable, the committee shall determine the proper price to be paid upon such mutualization and appropriate terms of payments thereof; said determination shall not be made, however, prior to January 1, 1947.

If, at the date of the appointment of such committee the New Company shall have in force Participating Life Insurance written subsequent to the effective date of this agreement in an amount in excess of its Non-Participating Life Insurance written during the same period, one-half (½) of such excess shall, for the purpose of fixing the proper price to be paid (but for no other purpose) be deemed to be, and shall be valued as, Non-Participating Life Insurance. If at the time of such appointment, there shall have been transferred from the Participating Department in accordance with the provisions of subparagraph (d) of paragraph 6 hereof, less than ten percent. (10%) of the then accrued earnings described therein, or if there shall have been

transferred to the Participating Department any working capital pursuant to the provisions of subparagraph (c) of said paragraph 6, any unpaid balance thereof shall, for the purpose of fixing the proper price to be paid (but for no other purpose) be deemed to be a debt then due and matured. Said Committee shall in its report to the New Company include a plan of mutualization of the New Company, or of the department or departments thereof specified in said request of the policy holders. Such plan shall specify, in addition to any other relevant matters, the price to be paid, the terms of payment, and the persons by whom and the manner in which the right to vote the stock of the New Company is to be exercised pending complete payment of the purchase price. In this connection the said Committee, if it deem it advisable, may provide in the plan for the creation of a voting trust, designate the initial trustees, and make provision for the appointment of their successors. Unless the benefits under Non-Can Policies have theretofore been fully restored and claims against the Liquidator fully paid, such plan shall further provide that such mutualization shall not affect the provisions of paragraph 17 or of paragraph 14 hereof or the right of holders of Non-Can Policies to the restoration of benefits from the sources and in the manner therein provided.

The New Company agrees that within sixty (60) days after the making of such report (unless said report shall be to the effect that mutualization is not then practicable) it will mail copies thereof to all of its policy holders entitled to vote upon such plan or plans of mutualization if submitted according to law. If within one hundred twenty (120) days after the mailing of such notice, ten percent. (10%) of the policy holders entitled to vote upon any such plan or plans (each policy holder being for this purpose regarded as one person regardless of the number of policies owned or amount of insurance held) shall request in writing the submission thereof, the New Company will promptly submit the same in accordance with the laws of the State of California then in effect. The Conservator for himself and for any successors in the ownership of said stock claiming under him in any manner other than through a sale of said stock pursuant to the provisions of subparagraph (d) hereof agrees to consent and hereby consents as the holder and owner of the stock of the New Company to such plan of mutualization. In the event said mutualization plan is adopted, the Conservator, or a Liquidator as aforesaid, shall dispose of such stock in accordance with such plan. The expenses of the foregoing proceedings including costs, fees, and expenses of the Price Determination Committee, shall be borne by the New Com-

pany; and, unless the proposed plan of mutualization is consummated, shall be charged to the Participating Department thereof.

In the event the Price Determination Committee has been appointed as herein provided prior to January 1, 1948, said Committee shall have the power to extend the time within which mutualization may be effected hereunder for such period or periods of time as it may deem necessary for the orderly completion of mutualization proceedings as herein provided.

(b) If at any time prior to the expiration of the option to mutualize a plan of merger, consolidation, reorganization or reinsurance of the New Company is presented to the New Company, or to the Conservator or Liquidator, which in the opinion of the Board of Directors of the New Company cannot be consummated without the elimination of the provisions for mutualization herein contained, the new Company may create an Appointing Committee in the same manner as though the proceeding were under subdivision (a) of this paragraph. Said committee, acting through not less than a majority of its members, shall designate a committee of not less than three nor more than five persons, skilled in matters of insurance company administration and management. The committee so designated shall, acting through not less than a

majority of its members, determine whether or not such plan of merger, consolidation, reorganization or reinsurance is practicable and desirable, having due regard to the interests of all persons interested in the New Company. If the committee determine that such plan is practical and desirable it shall determine a reasonable time which should be allowed for the consummation of the plan. Thereupon the New Company with the written approval of the Conservator or Liquidator, if then there be one, may submit to a vote of the policy holders (voting in the manner then prescribed by the laws of the State of California relating to voluntary mutualization) a proposal to suspend the mutualization provisions of this agreement for the time fixed by the committee, which proposal shall contain a brief description of the plan. If a majority of the policy holders so voting (but not less than ten percent. (10%) of those entitled to vote) vote in favor of the proposal, said provisions for mutualization shall be suspended for the time so specified and for the sole purpose of consummating the particular plan; and said plan may be consummated within said time free from said provisions and as though no such provisions had ever been contained in this agreement; but unless said plan be consummated within such time said provisions ipso facto shall become fully effective as though there had been no suspension thereof.

4303 The New Company shall, however, at least fifteen (15) days before any vote of policy holders is called under the provisions of this subparagraph, give written notice to each of its General Agents of the intention to call or take such vote. Such notice shall be deemed sufficiently given if and when it is deposited in the United States mails in a properly stamped container, addressed to such General Agent at his latest address appearing on the records of the New
4304 Company.

(c) At any time while the stock of the New Company is held by the Conservator or the Liquidator and has not been sold by him the Old Company shall have the right to pay to the Conservator or to the Liquidator the full amount then required by the New Company to complete the restoration of Non-Can benefits and also the amount required by the Conservator or Liquidator to complete the payment of all his claims
4305 and liabilities. In the event the benefits on Non-Can Policies shall have been fully restored from earnings of the New Company, contributions of the Old Company, or its shareholders, or otherwise, and all expenses of and claims against the Conservator or Liquidator of the Old Company have been fully paid, the Conservator or such Liquidator shall, upon order of the Court, distribute the stock then held by him in the manner provided by law; provided, however, that if such

4306 distribution is made prior to the expiration of the option to mutualize granted in subparagraph (a) of this paragraph 20, the distributees and their successors in the ownership of said stock, shall remain bound, until the expiration of said option, to the aforesaid consent to any mutualization plan of the New Company proposed in accordance with the provisions of subparagraph (a) of this paragraph 20.

4307 The Conservator or Liquidator shall cause to be endorsed upon the certificates evidencing the ownership of such stock an appropriate legend giving notice of the said option to mutualize; and the New Company shall cause a similar legend to be endorsed upon all certificates into which the same may be transferred prior to the expiration of said option.

(d) In the event the Conservator or Liqui-
4308 dator shall at any time determine that conditions are such as to require a sale of said stock, or any thereof, for the protection of the estate in conservation or liquidation, the New Company, or its policy holders, he may sell the same upon order of the Court made after a proper showing of the necessity for such sale upon a full hearing, of which hearing notice shall be given to such parties as the Court may determine are interested therein, and in such manner as the Court may direct.

4309 (e) It is the purpose, spirit, and intent of this agreement that, unless the provisions for mutualization are eliminated pursuant to the provisions of subparagraph (b) of this paragraph 20, the stock of the New Company shall not be sold or disposed of prior to the full restoration of benefits under Non-Can Policies except by proceedings for mutualization, so long as a reasonable probability of completing restoration of benefits under Non-Can Policies shall continue;
4310 and also, to the end that benefits under Non-Can Policies may be restored as early as practicable, the New Company declares that it will be its policy, at all times while its stock is held by the Conservator or Liquidator, so far as is reasonably practicable in the ordinary and reasonable conduct of its business, to endeavor to write new Non Participating insurance in an amount equal to or in excess of the amount of new Participating Insurance written by it.

4311 (f) If the provisions of this paragraph 20, or of any one or more of the subparagraphs hereof, should be contrary to law or illegal or void, then such paragraph, subparagraph, or subparagraphs, shall be null and void, and shall be deemed separable from the remaining covenants and agreements in this agreement contained; and shall in no way affect the validity of any of the remaining provisions of this agreement.

4312 Agents

(21) The New Company hereby assumes all obligations of the Old Company under agency contracts, provided the other party thereto accepts assumption of his contract by the New Company and agrees to continue bound thereby; provided, however, that the New Company shall not assume or be bound by any agreement or agreements which the Old Company may have made with agents with respect to the payment of
4313 commissions on any policies after lapsation. For the purpose of determining Agent's commissions, the reinsurance of policies of the Old Company under this agreement shall be deemed a continuance of existing policies, and not the writing of new insurance by the New Company.

Moratorium

(22) A Moratorium shall be and is hereby
4314 imposed upon all cash surrender values and policy loans (except loans for the purpose of paying premiums due or to be due within thirty (30) days of the loan date on the same policy or on policies of any form (issued with respect to the same person) for a period expiring November 22, 1936; and provided, that the period or extent of this moratorium may be extended or restricted from time to time by ex parte order of the Court made on the application of the Commissioner.

4315 The provisions of this paragraph shall not, however, apply to any increases in values that are accumulated from premium payments or loan repayments which are received subsequent to the effective date of this agreement.

During such period as this moratorium is in effect, the cash surrender option of all policies of the Old Company shall be considered as non-existent, except as provided above, and all policy holders who do not pay their premiums, and who
4316 are entitled under their policies to a guaranteed restricted value, will be ~~restored~~ to the automatic non forfeiture value (properly adjusted for any policy indebtedness and accrued interest thereon) under the policy.

Notice

(23) The New Company shall mail as promptly after the making of the order approv-
4317 ing this agreement as shall be reasonably practicable to the insured named in all policies and supplementary contracts of the Old Company in force at the effective date of this agreement, and any assignees thereof of record, a copy of this agreement as executed, to which the New Company may attach its certificate of reinsurance and assumption, inserted in an envelope, first class postage prepaid, addressed to the name and address of each of the persons aforesaid last

shown upon the records of the Old Company. There shall also be included therewith a notice referring to the provisions of paragraph 24 hereof with respect to the manner in which election or rejection of the reinsurance and assumption hereby contained must be manifested. By "assignees of record" is meant assignees appearing upon the records of the Old Company at its Home Office.

Election of Policy Holders and Claimants and the Effect Thereof.

(24) Policy holders and policy claimants of the Old Company may elect to accept or reject the reinsurance and assumption hereunder of *his* policy, contract, or claim at any time within seventy-five (75) days after the entry of the order approving this agreement. The filing with the New Company after the entry of the order of the Court approving the agreement of any claim or proof of loss shall constitute an acceptance of this agreement and a waiver of any right to reject the same. Any policy holder or policy claimant who shall fail to notify the New Company, in writing, of his rejection within said period shall automatically be deemed to have assented to and become bound by this agreement, and entitled to the benefits hereof.

The filing of a claim with the Liquidator shall, unless such claim is withdrawn within seventy-

five (75) days after the entry of the order of the Court approving this agreement, be deemed a rejection of such reinsurance and assumption. The New Company may nevertheless, with the consent of the Commissioner, and upon such terms as the New Company in its sole discretion may desire to impose, permit the withdrawal of a rejection whether or not the period for election herein fixed shall have expired, and permit the person so withdrawing his rejection to accept the reinsurance and assumption herein contained.

Any person electing to accept the reinsurance and assumption herein contained shall thereby be deemed to have entered into a novation with the New Company, and to have released the Old Company from all claims, liabilities, or obligations with respect to his policy or policy claim hereby assumed or reinsured, whether wholly or partially assumed or reinsured.

Conservator Not Personally Liable

(25) No personal liability on the part of Samuel L. Carpenter, Jr. is assumed under this agreement, but he is bound by the provisions of this agreement only in his capacity as such Conservator or as Liquidator of the Old Company. All undertakings and obligations herein set forth as undertakings or obligations of the Conservator are made only in his said capacities and to such extent as he had authority to make the same, and

4324 the Conservator makes no warranty of his authority to make the same.

Liability of New Company Limited Hereby

(26) It is understood that the New Company does not assume any liability of any character or description whatsoever of the Old Company except as and to the extent in this agreement expressly provided, and the provisions of this
4325 agreement shall be a complete and adequate defense by the New Company to any action, other than an action to enforce the express provisions of this agreement, which may be brought by any policy holders, policy claimants, creditors, or stockholders of the Old Company.

Assignability of Agreement

(27) This agreement and all rights, duties,
4326 and obligations hereunder shall inure to the benefit of and be binding upon the respective parties hereto, their several heirs, executors, administrators, successors, and assigns.

Approval of the Court

(28) This agreement shall not become binding upon any party hereto unless and until it shall have been approved by an order of the Court;

and when so approved shall constitute an independent agreement, superseding all prior agreements; and also an amendment of the agreement of July 22, 1936, relating to the reinsurance by the New Company of the business of the Old Company in such manner that said agreement, as amended, shall read in its entirety in the language of this agreement.

In Witness Whereof, the parties hereto have executed this agreement as of July 22, 1936, at the hour of one o'clock P. M. Pacific Standard Time, but in fact on the ..... day of October, 1936.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

By .....
Its Vice-President

(Corporate Seal)

Attest: .....
Its Asst. Secretary
"NEW COMPANY"

.....
SAMUEL L. CARPENTER, JR.
Insurance Commissioner of the State of California, as Conservator of The Pacific Mutual Life Insurance Company of California

4330 The undersigned, Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, does hereby give his written consent to and approval of the foregoing Rehabilitation and Reinsurance Agreement.

.....

SAMUEL L. CARPENTER, JR.

4331 as Insurance Commissioner of the State of California.

Endorsed: Entered Dec. 7, 1936. Docketed Dec. 8, 1936 Book 958, page 83. By I. Bottomley, deputy.

4332

Filed 4:51 P. M. Dec. 4, 1936. L. E. Lampton, county clerk; by E. T. Crozier, deputy.

4333 [TITLE OF COURT AND CAUSE.]

Clerk's Certificate to Judgment Roll.

The foregoing attached papers constitute the judgment roll in this action.

4334

Filed Dec. 8, 1936.

L. E. LAMPTON,

County Clerk, and Ex-Officio Clerk of the Superior Court of the State of California in and for the County of Los Angeles.

4335

By F. M. ULLRICH,

Deputy.

4336 [TITLE OF COURT AND CAUSE.]

Amended Notice of Appeal of Wm. H. Neblett.

To Names of Interested Persons	Interest Alleged	Attorneys Representing
Samuel L. Carpenter, Jr.	Insurance Commissioner of the State of California	U. S. Webb Attorney General Shepard Mitchell
4337 Pacific Mutual Life Insurance Company of California, a corporation	Respondent	O'Melveny, Tuller & Myers. Overton, Lyman & Plumb.
Charles Ross Cooper et al.	Holders of Non-can Policie	Hugh K. McKevitt
Rupert B. Turnbull et al. for themselves and for other Non-Cancellable Policyholders similarly situated	Holders of Non-can Policies	Rupert B. Turnbull
4338 Francis Adams, for himself and for other Non-Cancellable Policyholders similarly situated	Holder of Non-Can Policy, under which advanced settlement of disability claim is pending	Rupert B. Turnbull
George W. Manierre and B. Robert Getts, on their own behalf and on behalf of all similarly situated policyholders	Holders of Non-Can Policies	Messrs. Manierre & Cuthbertson
E. B. Tilton et al.	Holders of Non-Can Policies	Kenyon F. Lee

	To Names of Interested Persons	Interest Alleged	Attorneys Representing
4339	Vernon Bettin and William George Dickinson	Holders of Non-Can Policies	Messrs. Bettin, Painter & Wait
	Marshall D. Hall and Joseph C. McManus on behalf of themselves and other holders of Non-Cancellable Income Policies	Holders of Non-Can Policies	H. S. Dottenheim
	Neil S. McCarthy	Holder of Non-Can Policy	Neil S. McCarthy
4340	Ralph R. Huesman	Commercial Accident Policyholder; Non-Can Policyholder and Life Policyholder	Neil S. McCarthy
	Broadtown Investment Company, a corporation	Shareholder and beneficiary under Life Policies	Neil S. McCarthy
	Dr. Arthur B. Allen et al.	Holders of Non-Can Policies	W. B. Etheridge
4341	David Lynn Openshaw et al.	Holders of Non-Can Policies	Delvy T. Walton
	Henry B. Senn	Holder of Non-Can Policy	Albert E. Coger
	Herbert Freston.	Holder of Non-Can Policy	Herbert Freston
	Robert J. Webb and Philip M. Klutznick, for themselves and all other persons similarly situated	Holders of Non-Can Policies	Messrs. Jacob J. Lieberman and Aaron B. Rosenthal
	R. Rabinowitz	Holder of Non-Can and Life Policies	Lawler & Felix

	To Names of Interested Persons	Interest Alleged	Attorneys Representing
4342	Roscoe R. Hess	Holder of Non-Can Policy	Roscoe R. Hess and David R. Rubin
	G. C. Parsons, J. A. Marvin and G. R. Snider, et al., on behalf of themselves and all other holders of Non-Cancellable Policies, and as members of a Protective committee	Holders of Non-Can Policies	Messrs. Chapman, Snider, Duke & Landis, Hiram W. Johnson, Jr. Frank P. Doherty
4343	for Holders of Non-Cancellable Income Policies		
	William H. Neblett	Holder of Life Policy	William H. Neblett R. Dean Warner and LeRoy B. Lorenz
	Austin O. Martin	Holder of Non-Can Policy	Rex Hardy
	Rex Hardy	Holder of Non-Can Policy	Rex Hardy
4344	William A. Sullivan	Insurance Commissioner of the State of Washington	Ivan Merrick
	Arthur E. White	Holder of Non-Can Policy	Arthur E. White
	George I. Cochran et al.	Stockholders	Oscar Lawler and Harold Judson
	Wilbur A. Beckett et al.	Stockholders	Shattuck, Davis & Story
	Arthur D. Wunner	Former General Agent	Paul Overton

	To Names of Interested Persons	Interest Alleged	Attorneys Representing
4345	C. N. Wesley et al.	Non-Can Policy-Holders	Latham, Watkins & Bouchard
	Wilbur G. Katz et al.	Holders of Non-Can Policies	Bell, Boyd & Marshall Newlin & Ashburn
4346	Carl C. Katleman et al., for himself and all others similarly situated	Holders of Non-Can Policies	Carl C. Katleman
	Andrew J. Copp, Jr., on his own behalf	Holder of Non-Can Policy	Andrew J. Copp, Jr.
	Ralph C. Hamlin	Holder of Non-Can Policy	Garnet C. Rainey
	Rowe Sanderson et al.	Non-Can Policy-Holders	Chapman & Chapman
4347	Robert Casamajor et al.	Non-Can Policy-holders	Hahn & Hahn
	Ben S. Hunter	Life, Non-Can and Commercial Policy-holder	Ben S. Hunter
	Clara M. Garunam et al.	Allegedly a Non-Can Policyholder	M. W. Purcell
	John P. Oliver	Non-Can Policy holders	John P. Oliver
	Harold S. Cook, et al.	Stockholders' Protective Committee	Loeb, Walker & Loeb

	To Names of Interested Persons	Interest Alleged	Attorneys Representing
4348	Edwin Janss et al.	Policyholders' Committee representing commercial policyholders, non-can policyholders and life policyholders.	William M. Rains
4349	E. A. Conway	Non-Can Policyholder, and as Secretary of State and Ex-Officio Commissioner of Insurance of the State of Louisiana, on behalf of all policyholders in that state	D. M. Ellison Attorney for the Secretary of State of Louisiana
4350	Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel	On their own behalf and on behalf of each of them, and on behalf of all general agents and managers of The Pacific Mutual Life Insurance Company of California (each of said named interveners being a general agent, life policyholder, non-can policyholder, and stockholder	Cosgrove & O'Neal
	J. Parker Evans, on behalf of himself and all other holders of active life non-cancellable income policies issued in the State of Alabama who may wish to join with him in the proceeding	Non-Can Policyholder	A. A. Carmichael, Attorney-General of Alabama, and Frank E. Spain, Special Assistant Attorney-General of Alabama

You and each of you will please take notice that the intervenor, Wm. H. Neblett, appeals to the Supreme Court of the State of California from that certain order or judgment of the Superior Court of Los Angeles County, California, "Approving Rehabilitation and Reinsurance Agreement" rendered by the Court herein on December 4, 1936 and entered by the clerk on the 7th day of December, 1936, in Book 958, at page 83 of Judgments in the clerk's office of the County Clerk of Los Angeles County.

Dated: December 14, 1936.

WM. H. NEBLETT,
In Pro Persona,

R. DEAN WARNER,
LEROY B. LORENZ, AND
E. WALTER GUTHRIE,
Attorneys for Intervenor Wm. H. Neblett.

Wm. H. Neblett
R. Dean Warner
Leroy B. Lorenz
E. Walter Guthrie

4354 In the Superior Court of the State of California in and for the County of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404673.

AFFIDAVIT OF SERVICE BY MAIL.

4355 State of California, County of Los Angeles—ss.

Dorothy Day, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of the County of Los Angeles; that she is over the age of 18 years, and not a party to the within action; that her business address is 1009 Transamerica Building, Los Angeles, Cali-
4356 fornia; that on the 14th day of December, 1936, within she served the / amended notice of appeal of Wm. H. Neblett in the above-entitled matter on the interested persons in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said interested persons at the office address of said attorneys, as follows:

4357	"U. S. Webb, Attorney General,	State Building, Los Angeles, California;
	Shepard Mitchell,	603 Roosevelt Building, Los Angeles, California;
	O'Melveny, Tuller & Myers,	10th Floor, Title Insurance Bldg., Los Angeles, California;
	Overton, Lyman & Plumb,	733 Roosevelt Bldg., Los Angeles, California;
4358	Rupert B. Turnbull,	509 Union Bank Bldg. Los Angeles, California;
	"Manierre & Cuthbertson,	300 Garfield Building, Los Angeles, California.
	Kenyon F. Lee	820 H. W. Hellman Bldg., Los Angeles, California.
	Bettin, Painter & Wait,	1030 Rives Strong Bldg., Los Angeles, California.
	H. S. Dottenheim,	410 Board of Trade Bldg., Los Angeles, California.
4359		
	Neil S. McCarthy,	1111 Associated Realty Bldg., Los Angeles, California.
	W. B. Etheridge,	800 First Trust Building, Pasadena, California.
	Delvy T. Walton,	1120 Rowan Building. Los Angeles, California.
	Albert E. Coger,	230 H. W. Hellman Building, Los Angeles, California.
	Herbert Freston,	1010 Bank of America Building, Los Angeles, California.

4360	Jacob J. Lieberman and Aaron B. Rosenthal,	916 Garfield Building, Los Angeles, California.
	Lawler & Felix,	800 Standard Oil Bldg., Los Angeles, California.
	Roscoe R. Hess and David R. Rubin,	406 Rives Strong Bldg., Los Angeles, California.
	Chapman, Snider, Duke & Landis, Hiram W. Johnson, Jr., Frank P. Doherty,	c/o Frank P. Doherty, 517 Title Insurance Bldg., Los Angeles, Cal.
4361	Rex Hardy,	535 Van Nuys Building, Los Angeles, California.
	Ivan Merrick, Insurance Commissioner of the State of Washington,	State Building, Olympia, Washington.
	Shattuck, Davis & Story,	612 Story Building, Los Angeles, California.
	Paul Overton,	600 James Oviatt Bldg. Los Angeles, California.
4362	Latham, Watkins & Bouchard,	1112 Title Guarantee Bldg., Los Angeles, California.
	Newlin & Ashburn	1020 Edison Building, Los Angeles, California.
	Carl C. Katleman,	720 Garfield Building, Los Angeles, California.
	"Andrew J. Copp, Jr.	308 Pacific Commerce Building, Los Angeles, California
	Garnet C. Rainey	1300 Quinby Building, Los Angeles, California

4363	Chapman & Chapman	1322 Security Title Insurance Bldg., Los Angeles, California.
	Hahn & Hahn,	Pacific Southwest Building, Los Angeles, California
	Ben S. Hunter,	712 Rowan Building, Los Angeles, California
	M. W. Purcell,	802 Black Building, Los Angeles, California
4364	John P. Oliver	607 Pacific Commerce Bldg., Los Angeles, California
	Loeb, Walker & Loeb,	610 Pacific Mutual Bldg., Los Angeles, California
	William M. Rains,	939 Rowan Building, Los Angeles, California
	D. M. Ellison, Attorney for the Secretary of State of Louisiana,	Baton Rouge, Louisiana.
4365	Cosgrove & O'Neil	1031 Rowan Building, Los Angeles, California
	A. A. Carmichael, Attorney General of Alabama, and Frank E. Spain, Special Assistant Attorney-General of Alabama	Montgomery, Alabama.
	Arthur E. White,	General Delivery, Los Angeles, California.
	Hugh K. McKevitt,	Russ Building, San Francisco, California."

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or/and there is a regular communication by mail between the place of mailing and the place so addressed.

DOROTHY DAY.

Subscribed and sworn to before me this 14th day of December, 1936.

(Seal) HARRY W. DUDLEY,
Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed 4:47 P. M. Dec. 14, 1936. L. E. Lampton, county clerk; by C. H. Holdredge, deputy.

[TITLE OF COURT AND CAUSE.]

Notice of Appeal of Vernon Bettin and William George Dickinson.

To Names of Interested Persons	Interest Alleged	Attorneys Representing
Samuel L. Carpenter, Jr.	Insurance Commissioner of the State of California	U. S. Webb Attorney General Shepard Mitchell
Pacific Mutual Life Insurance Company of California, a corporation	Respondent	O'Melveny, Tuller & Myers. Overton, Lyman & Plumb.
Charles Ross Cooper et al.	Holders of Non-can Policies	Hugh K. McKevitt
Rupert B. Turnbull et al. for themselves and for other Non-Cancellable Policyholders similarly situated	Holders of Non-can Policies	Rupert B. Turnbull
Francis Adams, for himself and for other Non-Cancellable Policyholders similarly situated	Holder of Non-Can Policy, under which advanced settlement of disability claim is pending	Rupert B. Turnbull
George W. Manierre and B. Robert Gatts, on their own behalf and on behalf of all similarly situated policyholders	Holders of Non-Can Policies	Messrs. Manierre & Cuthbertson
E. B. Tilton et al.	Holders of Non-Can Policies	Kenyon F. Lee

	To Names of Interested Persons	Interest Alleged	Attorneys Representing
4372	Vernon Bettin and William George Dickinson	Holders of Non-Can Policies	Messrs. Bettin, Painter & Wait
	Marshall D. Hall and Joseph C. McManus on behalf of themselves and other holders of Non-Cancellable Income Policies	Holders of Non-Can Policies	H. S. Dottenheim
	Neil S. McCarthy	Holder of Non-Can Policy	Neil S. McCarthy
4373	Ralph R. Huesman	Commercial Accident Policyholder; Non-Can Policyholder and Life Policyholder	Neil S. McCarthy
	Broadtown Investment Company, a corporation	Shareholder and beneficiary under Life Policies	Neil S. McCarthy
	Dr. Arthur B. Allen et al.	Holders of Non-Can Policies	W. B. Etheridge
4374	David Lynn Openshaw et al.	Holders of Non-Can Policies	Delvy T. Walton
	Henry B. Senn	Holder of Non-Can Policy	Albert E. Coger
	Herbert Freston	Holder of Non-Can Policy	Herbert Freston
	Robert J. Webb and Philip M. Klutznick, for themselves and all other persons similarly situated	Holders of Non-Can Policies	Messrs. Jacob J. Lieberman and Aaron B. Rosenthal
	R. Rabinowitz	Holder of Non-Can and Life Policies	Lawler & Felix

	To Names of Interested Persons	Interest Alleged	Attorneys Representing
	Roscoe R. Hess	Holder of Non-Can Policy	Roscoe R. Hess and David R. Rubin.
	G. C. Parsons, J. A. Mar vin and G. R. Snider, et al., on behalf of themselves and all other holders of Non-Cancellable Policies, and as members of a Protective committee	Holders of Non-Can Policies	Messrs. Chapman, Snider, Duke & Landis, Hiram W. Johnson, Jr. Frank P. Doherty
4376	for Holders of Non-Cancellable Income Policies		
	William H. Neblett	Holder of Life Policy	William H. Neblett R. Dean Warner and LeRoy B. Lorenz
	Austin O. Martin	Holder of Non-Can Policy	Rex Hardy
	Rex Hardy	Holder of Non-Can Policy	Rex Hardy
4377	William A. Sullivan	Insurance Commissioner of the State of Washington	Ivan Merrick
	Arthur E. White	Holder of Non-Can Policy	Arthur E. White
	George I. Cochran et al.	Stockholders	Oscar Lawler and Harold Judson
	Wilbur A. Beckett et al.	Stockholders	Shattuck, Davis & Story
	Arthur D. Wunner	Former General Agent	Paul Overton

	To Names of Interested Persons	Interest Alleged	Attorneys Representing
4378	C. N. Wesley et al.	Non-Can Policy-Holders	Latham, Watkins & Bouchard
	Wilbur G. Katz et al.	Holders of Non-Can Policies	Bell, Boyd & Marshall Newlin & Ashburn
4379	Carl C. Katleman et al., for himself and all others similarly situated	Holders of Non-Can Policies	Carl C. Katleman
	Andrew J. Copp, Jr., on his own behalf	Holder of Non-Can Policy	Andrew J. Copp, Jr.
	Ralph C. Hamlin	Holder of Non-Can Policy	Garnet C. Rainey
	Rowe Sanderson et al.	Non-Can Policy-Holders	Chapman & Chapman
4380	Robert Casamajor et al.	Non-Can Policy-holders	Hahn & Hahn
	Ben S. Hunter	Life, Non-Can and Commercial Policy-holder	Ben S. Hunter
	Clara M. Garunan et al.	Allegedly a Non-Can Policyholder	M. W. Purcell
	John P. Oliver	Non-Can Policy holders	John P. Oliver
	Harold S. Cook, et al.	Stockholders' Protective Committee	Loeb, Walker & Loeb

	To Names of Interested Persons	Interest Alleged	Attorneys Representing
4381	Edwin Janss et al.	Policyholders' Committee representing commercial policyholders, non-can policyholders and life policyholders	William M. Rains
4382	E. A. Conway	Non-Can Policyholder, and as Secretary of State and Ex-Officio Commissioner of Insurance of the State of Louisiana, on behalf of all policyholders in that state	D. M. Ellison Attorney for the Secretary of State of Louisiana
4383	Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel	On their own behalf and on behalf of each of them, and on behalf of all general agents and managers of The Pacific Mutual Life Insurance Company of California (each of said named interveners being a general agent, life policyholder, non-can policyholder, and stockholder	Cosgrove & O'Neal
	J. Parker Evans, on behalf of himself and all other holders of active life non-cancellable income policies issued in the State of Alabama who may wish to join with him in the proceeding	Non-Can Policyholder	A. A. Carmichael, Attorney-General of Alabama, and Frank E. Spain, Special Assistant Attorney-General of Alabama

You and each of you will please take notice that the objectors Vernon Bettin and William George Dickinson appeal to the Supreme Court of the state of California from that certain order or judgment of the Superior Court of Los Angeles county, California, "Approving Rehabilitation and Reinsurance Agreement" rendered by the court herein on December 4, 1936, and entered by the clerk on the 7th day of December, 1936, in book 958, at page 83 of judgments in the clerk's office of the county clerk of Los Angeles county.

Dated: December 28, 1936.

BETTIN, PAINTER & WAIT,
VERNON BETTIN,

Attorneys for Objectors Vernon Bettin and William George Dickinson.

4387 In the Superior Court of the state of California, in and for the county of Los Angeles.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner, vs. The Pacific Mutual Life Insurance Company of California, a corporation, respondent. No. 404,673.

AFFIDAVIT OF MAILING.

4388 State of California, County of Los Angeles—ss.

Ray H. Kinnison, being first duly sworn, deposes and says: That affiant is a citizen of the United States, over eighteen years of age, resident of Los Angeles County and not a party to the within action.

That affiant's business address is 1030 Rives Strong Building, Los Angeles, Calif.

That affiant served a copy of the attached
4389 Notice of Appeal by placing said copy in an envelope addressed to the following persons at the office addresses set opposite their respective names:

Rupert B. Turnbull	509 Union Bank Bldg., Los Angeles, Cal.
Kenyon F. Lee	820 H. W. Hellman Bldg., Los Angeles, Cal.
Neil S. McCarthy	1111 Associated Realty Bldg., L. A., Cal.

4390	W. B. Etheridge	800 First Trust Bldg., Pasadena, Calif.
	Mr. Shepard Mitchell and U. S. Webb, Attorney General	603 Roosevelt Bldg., Los Angeles, Cal.
	O'Melveny, Tuller & Myers and Overton, Lyman & Plumb	909 Title Insurance Bldg., L. A., Calif.
	Delvy T. Walton	1120 Rowan Bldg., Los Angeles, Cal.
4391		
	H. S. Dottenheim	410 Board of Trade Bldg., L. A., Calif.
	Albert E. Coger	230 H. W. Hellman Bldg., L. A., Calif.
	Herbert Freston	1010 Bank of America Bldg., L. A., Calif.
	Jacob J. Lieberman and Aaron B. Rosenthal	916 Garfield Bldg., Los Angeles, Cal.
4392		
	Lawler & Felix	800 Standard Oil Bldg., L. A., Calif.
	Roscoe R. Hess and David R. Rubin	406 Rives Strong Bldg., L. A., Calif.
	Frank P. Doherty, Messrs. Chapman, Snider, Duke & Landis, Hiram W. Johnson, Jr.	517 Title Insurance Bldg., L. A., Calif.

4393	Oscar Lawler and Harold Judson	800 Standard Oil Bldg., L. A., Calif.
	Shattuck, Davis & Story	612 Story Bldg., Los Angeles, Cal.
	Latham, Watkins & Bouchard	1112 Title Guarantee Bldg., L. A., Calif.
	Paul Overton	600 James Oviatt Bldg., L. A. Calif.
4394	William H. Neblett, R. Dean Warner and LeRoy B. Lorenz	1009 Transamerica Bldg., L. A., Calif.
	Newlin & Ashburn	1020 Edison Bldg., Los Angeles, Cal.
	Carl C. Katleman	720 Garfield Bldg., Los Angeles, Cal.
	Rex Hardy	535 Van Nuys Bldg., Los Angeles, Cal.
4395		
	Hahn & Hahn	808 Pacific Southwest Bldg., Pasa., Cal.
	Andrew J. Copp, Jr.	308 Pacific Commerce Bldg., L. A., Cal.
	Garnet C. Rainey	1300 Quinby Bldg., Los Angeles, Cal.
	M. W. Purcell	802 Black Bldg., Los Angeles, Cal.

4396	John P. Oliver	706 Pacific Commerce Bldg., L. A., Calif.
	Chapman & Chapman	1322 Security Title Ins. Bldg., L. A., Cal.
	Loeb, Walker & Loeb	610 Pacific Mutual Bldg., L. A., Calif.
	Ben S. Hunter	712 Rowan Bldg., Los Angeles, Cal.
4397	William M. Rains	939 Rowan Building, Los Angeles, Cal.
	Cosgrove & O'Neal	1031 Rowan Bldg., Los Angeles, Cal.
	A. A. Carmichael and Frank E. Spain	State Capital, Montgomery, Alabama.
	D. M. Ellison, Attorney for Secretary of State of Louisiana	Baton Rouge, Louisiana.
4398	Arthur E. White	General Delivery, Los Angeles, Cal.
	Manierre & Cuthbertson	300 Garfield Bldg., Los Angeles, Cal.
	Ivan Merrick, Insurance Commissioner of the State of Washington	Olympia, Washington.
	Hugh K. McKevitt	1620 Russ Bldg., San Francisco, Calif.

which said envelopes were then sealed and postage fully prepaid thereon, and thereafter were on December 30th, 1936, deposited in the United States mail at Los Angeles, Calif. That there is a delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

RAY H. KINNISON.

Subscribed and sworn to before me this 30th day of December, 1936.

(Seal) GERTRUDE R. KLEIN,

Notary Public in and for the County of Los Angeles, State of California.

Endorsed: Filed Dec. 31, 1936, 3:37 p. m. L. E. Lampton, county clerk; by C. H. Holdredge, deputy.

4402 **Clerk's Certificate.**

STATE OF CALIFORNIA, }
COUNTY OF LOS ANGELES } ss.

I, L. E. Lampton, county clerk and *ex officio* clerk of the Superior Court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers in the above entitled action now on file in my office and that the same contains full, true and correct
4403 copies of the judgment roll and notices of appeal, together with the endorsements on said papers and documents, all of which papers and documents are a part of the files and records of the Superior Court.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court this.....day of January, 1937.

4404 (Seal) L. E. LAMPTON, *County Clerk.*

By ....., *Deputy.*

4405 [TITLE OF COURT AND CAUSE.]

Opinion of the Trial Judge.

Los Angeles, California,

Thursday, December 3, 1936, 10 A. M.

The Court: In the case of Samuel L. Carpenter, Jr., as Insurance Commissioner of the State of California, petitioner, against the Pacific Mutual Life Insurance Company of Cali-
4406 fornia, the court is now ready to announce its conclusion upon the matters submitted. Before entering upon this task, the court feels under obligation to express to the members of the bar who have participated in this proceeding throughout this long period, which now covers nearly four months, the gratitude of the court for your uniform courtesy to the court, to the judge thereof, and to each other in the proceedings that have taken place. I like to say that we have all been
4407 working together to a common end and it is rather unusual where so many members of the bar participate in a proceeding, representing in several instances adverse and antagonistic interests, that such a harmony of action should have resulted in this proceeding. By that I am reminded of a definition given by Dean Roscoe Pound of the Harvard Law School in an address to the American Bar Association at Boston last summer of the term "profession," spoken of as the profession of law. He said: "By the term

'profession,' when we speak of the profession of law we mean an organized calling in which men pursue some learned art and are united in the pursuit of it as a public service, none the less a public service because they make a livelihood thereby. I have never in my experience at the bar or on the bench seen the true essence of the profession and practice of the law so thoroughly demonstrated as it has been by counsel who have participated in this hearing. You have demonstrated that you have been here pursuing your duties as a public service. For this I am very grateful. It has minimized my troubles, and greatly lessened the weight of the burden that was cast upon me when I happened to be chosen to preside over this hearing and determine the issues therein.

A brief history of this proceeding and a statement of the issues that are before us will be helpful.

On July 22, 1936, an order was entered herein under the provisions of section 1011 of the Insurance Code of 1935, vesting title to all the assets of the Pacific Mutual Life Insurance Company of California in the Insurance Commissioner of this state, with directions to him to conduct, as conservator, the business of such company.

On September 25, 1936, the Commissioner, as conservator, filed his petition herein, setting forth

4411 a plan cast in the form of a rehabilitation and reinsurance agreement, and asked the court's approval thereof, under authority of section 1043 of the Insurance Code.

An order to show cause why such plan should not be approved, together with an order for notice, was issued by the court, and hearing thereon was set for October 19, 1936.

On October 17, 1936, Mr. L. M. Giannini, on behalf of Transamerica Group, filed a proposal
4412 to reinsure the business of the company, which proposal was amended and revised and again presented and filed on November 21, 1936, during the progress of the hearing; and this proposal has been adopted, and reproposed by interveners represented by Mr. Doherty and those represented by Mr. Dottenheim.

On October 19, 1936, a hearing commenced and has continued during each judicial day to the
4413 present moment involving issues of law and fact created by numerous interventions by parties in interest and by answers to the order to show cause and by motions made during the progress of the hearing. The single issue of fact relates to the existence of a state of insolvency or a hazardous condition of the company at the date of taking over by the Commissioner. This may be expeditiously disposed of by stating that it is clearly established by proofs that at the date of taking the condition of the company found upon

4414 examination by the Commissioner was such that its further transaction of business would be hazardous to policyholders and to the public and that the company was insolvent within the meaning of article 13, chapter 1, part 2, division 1 of the Insurance Code. Among the issues of law, those calling for decision at this time are as follows:

First: Is the transfer of assets provision in the conservator's plan condemned by sections 3439 and 3442 of the Civil Code?

4415 Second: Are sections 1011 and 1043 of the Insurance Code valid when measured by the terms of section 10, article 1, of the Constitution of the United States and of the corresponding provisions in section 16 of article 1 of the California Constitution prohibiting the passage of laws by a state which impair the obligations of contracts?

Third: Is section 1043 of the Insurance Code
4416 valid under the Fourteenth Amendment to the Constitution of the United States and under the corresponding provisions in section 13 of article 1 of the State Constitution prohibiting state legislation which deprives any person of property without due process of law or denies equal protection of the law?

Fourth: Is the proposed plan when considered as an exercise of lawful power by the state agent under the above code provisions and under laws of the state valid when measured by the contract

4417 and due process and equal protection clauses of the Constitution? And because of the injection of other plans or offers there has arisen the following incidental question:

Fifth: What is the extent or limitation of the powers of this court under the Insurance Code and general laws in respect to action on the conservator's petition for approval of his plan and in respect to modification thereof or substitution therefor of another and different plan and in 4418 respect to ordering other proceedings under the code to be instituted by the conservator?

Under the due process clause, the question of validity of the proposed plan falls into two parts: The one relating to whether the plan is fair, just and equitable and not arbitrary or capricious; the other relating to notice and hearing.

The first question relating to fraudulent conveyance is the single statutory law issue and re- 4419 quires no separate consideration; as the answer thereto will logically follow with the answers to the constitutional questions.

It will be recalled that sections 3439 and 3442 relate to the character of transfers made by an owner for the purpose of hindering, delaying or defrauding creditors. Section 3439 condemns such; and section 3442 adds to the condemnation a provision for a presumption, unrebuttable, that where the transfer is made by the owner while in a state of insolvency, the intent to defraud is

4420 established. In all other cases intent is a matter of proof. The question arising in this proceeding under the invocation of those sections relates to a proposed transaction which, in effect, would be the same as a judicial sale; because if the plan is approved, the court orders the sale. I take it for granted that there can exist no intent to defraud under any statute where the transfer is made lawfully, under an order of the court.

4421 As a preface to this decision on the law questions, and as the foundation upon which the conclusions of the court will be erected, a statement of general rules accepted without question by all of the learned profession of law and by the courts, and excerpts from cases that constitute authority binding upon this court will be first given.

4422 And I call attention in this connection to this, that the cases from which these excerpts are taken, with possibly one exception, are from courts, or were lodged in courts which have the right to direct this court, and bind it, namely, from the Supreme Court of the United States whose authority is paramount in this country upon all questions arising under the Constitution of the United States. Next, is the Supreme Court of the state of California, and the several appellate courts of the state of California whose authority over this court on all questions of law, statutory or constitutional, is binding.

4423 Next, the decisions of the courts of the state of New York, from which state and its statutes, as interpreted by the courts of that state, the statute here in question was substantially copied. Of that I will have more to say later.

"The duty of deciding whether a statute is void as being in conflict with the State or National Constitution is characterized by the court as of the most delicate nature. In such a case a clear and substantial conflict with the funda-
4424 mental law must be found to exist to justify the condemnation of the statute; but, when found, courts must not hesitate to condemn. Their duty is plain and should be fearlessly performed. The Legislature is presumed to have had the Constitution in mind when passing statutes. The exponent of the popular will and its act must be treated with respect and reconciled and sustained if possible. A court is never justified, therefore, in setting at naught an act of the Legislature
4425 unless it is clearly repugnant to the Constitution and its power so to do should never be exerted except when the conflict between the statute and the Constitution is palpable and incapable of reconciliation.

In other words, nothing short of a constitutional prohibition so explicit and clear as to leave no reasonable doubt on the mind can justify the court in declaring an act of the Legislature null and void.

4426 Having in mind that the Insurance Code, and particularly the sections thereof here in controversy, is an act remedial in its nature and passed by the California Legislature under authority of its reserve police power, it has been universally held by the courts of last resort everywhere that contracts made with institutions affected with a public interest are inherently subject to the paramount power of the sovereign states, the people; the reserve power, sometimes called the police
4427 power, to enact, through the Legislature, additional remedial legislation in the public interest affecting the supervision, regulation, control or liquidation of such corporate institutions."

Citing *West River Bridge v. Dix and others*, 6 Howard 507, and *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398.

In *Lawton v. Steel*, 152 U. S. 133, it is stated:

4428 "'To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. Its determination as to what is the proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

During the early development of our government under the Constitution, the Supreme Court of the United States in the Legal Tender cases, 12 Wallis 457, at page 551, declared:

"As in a state or civil society property of a citizen is ownership subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

In considering the scope of the impairment clause in the Constitution as affected by the reserve police power, the Supreme Court of the United States in the Blaisdell case, 290 U. S. 398, said:

"Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to the end has the result of modifying or abrogating contracts already in effect. Stevenson v. Binford, 287 U. S. 251."

Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sov-

4432 ereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, and government which retains adequate authority to secure the business and good order of society. This principle of harmonizing the constitutional prohibition of the necessary residuum of state power has had progressive recognition in the
4433 decisions of this court. With a growing recognition of public needs and the relation of individual rights to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the states to protect their fundamental interests. The principle of this development is, as we have seen, that the reservation of the reasonable exercise of the protective power of the state is read into all contracts.

4434 Respecting the due process clause and the requirement of notice and hearing, the Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive any person of life, liberty or property without due process of law. In *People v. Broad,* 216 California 1, our Supreme Court has said:

"The rule is well settled that to constitute due process of law in regard to the taking of property the statute should give the parties interested

4435 some adequate remedy for the vindication of their rights, and it has accordingly been held that to constitute due process the statute itself must provide for notice of the time and place of hearing where the parties may present in a regular and orderly manner issues of law and fact."

The above case involved a statute which decreed a forfeiture of property found to be used in the commission of a public offense. Likewise, the case of *Teck v. Anderson*, 57 California 251, 4436 cited by counsel, involved the statute prescribing a forfeiture of specific property used in the commission of a public offense, and wherein it was held that the confiscation thereof without judicial hearing and judgment, and without due notice was in violation of the due process inhibition.

The case of *Modern Loan Company v. Police Court*, 12 California Appellate 582, cited by counsel, involved the constitutionality of search warrant provision in the Penal Code; and therein 4437 the court held that one who is in possession of property under a claim of right cannot be deprived of the possession without due process of law; and that to constitute due process of law the statute must provide for notice of a time and place of hearing.

The case of H. Moffett Co. v. Hecky, 68 Cal. App. 35, also cited, involved the question of the constitutionality of the Cattle Inspection Act of 1917, which authorized the director of agricul-

4438 ture to inspect cattle in course of shipment, and to take all found by him not to belong to the shipper; such cattle to be thereafter dealt with in accordance with the rules of the Board of Agriculture in such case made. It was held that this was void under the due process clause, for taking, for lack of provision for notice and hearing.

In the case of Matter of Lambert, 134 Cal. 626, the Supreme Court declared the insanity law
4439 of 1897 void under the due process clause, for failure therein to provide for notice to the person charged with insanity, and opportunity to be heard.

All of the foregoing California cases were cited in support of the contention herein made that section 1043 of the Insurance Code was void for failure therein to provide for notice and hearing.

4440 It will be first noted that none of these cases involved a statute enacted under the police power; and, second, that each of the statutes involved and condemned provided for direct taking of the property from the owner or from the possession of one who held the same under claim of right and title.

The Fifth Amendment to the Constitution of the United States contains the same due process clause as appears in the Fourteenth Amendment, but therein limited to apply to acts of Congress,

4441 as distinguished from acts of the state legislatures.

In the Legal Tender cases, 12 Wallis 457, at page 551, the Supreme Court of the United States, in referring to the Fifth Amendment, said:

"That provision has always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the
4442 exercise of lawful power. It has never been supposed to have any bearing upon or inhibit laws that indirectly work harm and loss to individuals."

Reminding ourselves again that the act here in question is of a remedial nature, I now quote from *Gibbs v. Zimmerman*, 290 U. S. 326, wherein the Supreme Court of the United States declared:

"Although a vested cause of action is property,
4443 and is protected from arbitrary interference (Pritchard v. Norton, 106 U. S. 124, 132), the appellant has no property in the constitutional sense in any particular form of remedy. All that he is guaranteed under the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure."

In *Doty v. Love*, 295 U. S. 64, the same court announced that the Constitution of the United States does not confer upon depositors in a bank

4444 seized by the state official the right to liquidation solely in the hands of such official, but that such may be substituted by a plan or reorganization by the bank itself, through its reorganized form.

In Hebbis v. New York, 291 U. S. 502, at page 525, the Supreme Court of the United States said:

"The Fifth Amendment in the field of federal activity, and the Fourteenth as respects states' 4445 action, do not prohibit governmental regulation for the public's welfare. They merely condition the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process; and a guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious; and that the means selected shall have a real and substantial relation to the object sought to be attained."

4446 In *People v. Title & Mortgage Guaranty Company,* 264 New York 69, the court of appeal in New York, in dealing with a statute which authorized the appointment of the insurance superintendent as rehabilitator, in the first instance—as distinguished from conservator as in our statute—stated:

"A statute may be unconstitutional which, without notice to an owner, bars reclamation by the owner of property in the hands of a receiver or liquidator; but this statute has no such effect.

4447 When the administration of property is the duty and part of the business of a corporation taken over by a liquidator or rehabilitator, then the continued administration by him is merely an incident of the liquidation or rehabilitation proceeding, and deprives those interested in such property of no rights. Only where there is a deprivation of rights is notice and opportunity to be heard in opposition necessary."

4448 I now quote from an Iowa case, *Peverill v. Board of Supervisors,* 208 Iowa 94, also reported in 222 N. W. 535, because the language used in this opinion is illuminating, and better expresses the views therein stated than I could with my own choice of language:

"This presents a question of where the Legislature enacts a statute under the police power, whether in so doing it is bound by the rule of
4449 due process to the extent of requiring the provisions for notice and opportunity to be heard. Is the due process rule a limitation on the right to exercise the police power? The due process rule is not confined alone to our system of jurisprudence, but it is common to thoughtful men everywhere. The heart of it lies in the thought that a right to present defenses must precede judgment and necessarily involve therein the right of notice and opportunity to be heard is the very foundation of the doctrine."

4450 The court then reviews many of the decisions of the Supreme Court of the United States on that subject, then in existence, this decision having been rendered, I think in 1928, and then proceeds:

"The conclusion we draw from the review of the decisions of the United States is that the due process rule is not a limitation upon the right of the state to exercise its police power unless the
4451 attempted exercise of such power is arbitrary or unreasonable or an improper use of such power. This seems the necessary conclusion from those cases."

In the case of *Doty v. Love,* 295 U. S. 64, the due process clause was considered in connection with a statute of Mississippi providing for a reorganization of banks in process of liquidation under the bank superintendent. The statute made
4452 no provision for notice upon anybody, but notice was actually given to a large number of depositors. The statute required the plan of reopening a bank in liquidation to be submitted by the bank superintendent to the chancery court for approval if found to be reasonable and just. Upon the approval of such a plan, assenting and non-assenting creditors shall be required to accept payment in accordance with its terms. Upon

4453 appeal by non-assenting creditors, Mr. Justice Cardoza stated:

"If we look to the surface of the statute and no further there is not even colorable basis for the argument that the Constitution is infringed. All the statute does upon its face is to change the method of liquidation. The assets of the business are to be devoted without impairment or diversion to the payment of the debts. In the discretion of the court of chancery a reopened bank is
4454 to take the place of the state superintendent for the purpose of gathering in the assets and discharging liabilities. The substitution may not be made unless the court is satisfied that the reopened bank is solvent and able to satisfy the debts to be assumed. Payment of the creditors is still the end to be attained and resumption of business a means and nothing more."

"Finally," the court goes on to say, "the appel-
4455 lants say that proceedings in a court of chancery are void for insufficient notice to the depositors and others. A sufficient answer is that the appellants appeared generally and were fully heard upon the merits."

It is generally accepted as law that the due process clause is not valid because discretionary power is vested in an administrative officer, such officer may within proper limitations exercise discretion, find facts and exercise judgment, and boards exercising administrative functions may

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promulgate and adopt rules and regulations. Legislatures may, within their police power, regulate and control institutions affected with a public interest and the power is broad enough to authorize seizure of such institutions upon the judgment of the supervising official that it is solvent without a hearing and a determination in advance by a court and to proceed to liquidate its affairs subject, however, to the right of an appeal to the court by the parties in interest.

The supervising officer who takes over an insolvent institution represents and acts for the institution and its stockholders and creditors as well. He is the state officer designated for such purposes. When he approves or presents a rehabilitation or reorganization or reinsurance agreement for approval by the court he is acting for the institution and its stockholders and policyholders and creditors. He is presumed to be an impartial agent for that purpose and to act fairly, impartially and justly until it is shown to the contrary. The action of such administrative officer is not a finality. The court of chancery is at all times open to any interested party to test the legality of his acts and to inquire into the fairness and regularity thereof, and to prevent unreasonable and arbitrary action on his part. The jurisdiction of a court of chancery to give approval to settlements of such officers or of receivers acting in a similar capacity has always existed, and those who enter into contractual re-

4459 lations with the institution involved were chargeable with notice of that power and became subject to its exercise in the making of such contracts.

In the case of *People v. Title & Mortgage Guaranty Company,* 264 New York 269, the New York Court of Appeals, which is the highest court of that state, said:

"The prohibition contained in section 10 of
4460 article 1 of the Constitution of the United States that no state shall pass any law impairing the obligation of contracts like the broader prohibition contained in the Fourteenth Amendment that no state shall deprive any person of life, liberty or property without due process of law, is not an absolute one and is not to be read with literal exactness like a mathematical formula."

Citing *Home Building & Loan Association v.*
4461 *Blaisdell,* 290 U. S. 396.

"No unchanging yardstick can be fastened applicable at all times and under all circumstances by which the validity of each statute may be measured and determined. Every case must be determined upon its own circumstances. Legislation which impairs the obligation of a contract or otherwise deprives a person of his property can be sustained only when enacted for the promotion of the general good of the public, the protection of the lives, health, morals, comfort and

4462 general welfare of the people, and when the means adopted to secure that end are reasonable. Both the end sought and the means adopted must be legitimate. That is within the scope of the reserve power of the statute construed in harmony with the constitutional limitation on that power."

From these general principles and rules and from these excerpts from adjudicated cases it must be manifest that sections 1011 and 1043 of
4463 the Insurance Code do not violate the impairment clause in the national and state constitutions, nor does section 1043 fall within the prohibition of the due process clause for lack therein of provision for notice and hearing. On its face it purports to take nobody's property. On its face it is simply another remedy furnished by the Legislature, in the process of reorganizing, restoring or liquidating insolvent or afflicted corporations whose business is affected with a public interest.

4464 Measured under these authorities, the plan proposed by the Commissioner contains within its provisions none which I have been able to find which are in conflict with the provisions of either of these constitutional provisions. None such have been called to my attention with that degree of certainty which makes it manifest that there is such a conflict; and my own study and review of the plan, in the light of these authorities, has convinced me that there is no ground for declar-

4465 ing that the plan does violate any of the constitutional provisions.

These conclusions dispose likewise, in addition to what I have previously said, of the charge that the proposed transfer of assets would constitute a fraudulent conveyance. If this court has the lawful power to approve the plan of rehabilitation, as I have indicated it does possess, then the proposed transfer of assets certainly would not be a fraudulent conveyance, under the definitions
4466 of sections 3439 and 3442 of the Civil Code.

Having decided these four questions, we are now brought to a decision of the question whether the proposed plan, thus found to be free of legal and constitutional objections, is reasonable, just and equitable, and should therefore be approved, notwithstanding the evidence relating to the Giannini offer, which is in turn presented to the court for approval and adoption. This question must, in turn, await answer until it is
4467 first determined what are the powers of this court in this proceeding under the Insurance Code.

Before entering upon that subject it is well to get clearly in mind what is before this court by way of past history of legislation in respect to the entry by the state into the control and management and supervision of business affected with a public interest; particularly, of course, with reference to the history respecting life insurance business.

4468 In 1860 the Legislature of this state passed an act providing for the appointment or the creation of the office of insurance commissioner, and vested in him visitorial powers, and the power to grant and revoke licenses of authority to do business to insurance companies; and granted to him the further right, after ascertaining that a company was insolvent, upon examination, to require the attorney general to bring an action to dissolve the company; nothing more. That act became
4469 part of the codes in 1872.

From that time there has been a steadily progressive advance by the state not only in respect to the supervision and control of life insurance business and companies, but of banks, building and loan associations, and numerous others. There has been a steady progress of deeper entry by the state into those affairs and the field of operation of the state agents has been constantly enlarged.

4470 We thus learn, from that history, that presently the state added to the authority of the insurance commissioner, the banking commissioner, the building & loan commissioner, the right to liquidate. Then, later, the provision for the commencement of proceedings was changed so that, instead of the state officer being required to apply to the court to be appointed and given in charge of the company's business, he was given authority to go and take possession without any court order. However, he was required, in that con-

4471 nection, to immediately thereafter file his return with the Superior Court; and thereafter the proceeding, under limitations, progressed in the Superior Court.

I think it was in respect to the banking laws that it was first provided that the bank superintendent should, without notice or hearing, go into a bank and take possession of it and run it, for the purpose of liquidation. That was then extended to the commissioner in charge of building
4472 and loan associations. It happened that I tried the first case that arose under that new provision, where the authority of the building and loan commissioner to step in and take possession without an order of court was questioned. It is now settled, and nobody questions it. Then it was extended to the insurance commissioner. He was given the right to step in and take possession and run the business; and if he could not, within a reasonable time, cure the cause of the trouble, so
4473 that he could restore possession to the insurance company, he had the right to apply for an order of liquidation, and liquidate.

Then, in 1935, the Legislature added another remedy; that is, the remedy of rehabilitation—something new in California; and it was something new, under that name, at least, anywhere in this country, until 1932, when the New York Legislature enacted such a law.

4474 In 1935 the California Legislature copied the law, in principle, into section 1043 of our Insurance Code. It is under that section that the Insurance Commissioner, as conservator, has chosen to act, as reflected by his petition here awaiting disposition.

The Insurance Commissioner, as conservator, having decided to rehabilitate the Pacific Mutual Life Insurance Company of California, and having, pursuant to the statute, filed his petition that
4475 the plan he had made should be by this court approved, we are confronted with an offer presented by Mr. Giannini which, to all intents and purposes, is an offer to purchase and assume—necessarily under a liquidation process.

Thus we have the two different propositions confronting us: The Commissioner of the state, as conservator, petitioning that a plan of rehabilitation be approved; and interveners who op-
4476 pose that plan proposing and petitioning that a liquidation be had and a sale of the assets made to this bidder.

That brings us squarely to the proposition stated a moment ago as question No. 5 herein: What are the powers or the limitation on the powers of the court when confronted with the situation on this record?

We will presently see with the aid of the authorities I am about to quote.

4477 In the case of *Richardson v. Superior Court*, 138 Cal. App. at page 389, in an application for a writ of prohibition brought by the building and loan commissioner to prevent the Superior Court from appointing a receiver to take over the building and loan association previously taken by the commissioner under the provisions of the Building and Loan Act, the question of jurisdiction of the Superior Court and the limitations which may be found to exist staying the exercise of judicial
4478 power where such exercise of judicial power would interfere with administrative authority created by statute, was presented and considered and therein the court held that the assertion of authority by the court to entertain an attack upon the administration of affairs of a building and loan corporation by the commissioner who had taken it over under the act, which is similar to the one here involved, and a proceeding to remove him from his office so far as the corpora-
4479 tion is concerned and to compel him to surrender the entire business to the court would be an assumption of jurisdiction which, under the existing laws, the Superior Court with all its equity powers does not possess. In that same case the late Mr. Justice Conrey, then presiding justice of the District Court of Appeal, later justice of the Supreme Court, said:

"While it thus appears that the authority of the commissioner over the property and business affairs of the association when in his custody is

4480 subject to such prescribed judicial review and control, the principal characteristics of his position as administrator are those of a public officer charged with a statutory duty which for reasons of public policy has been made to include a trust in private property. The statute constitutes a declaration of policy by the state to the effect that the protection of investments in building and loan associations is a special subject of care by the state and that the measures prescribed in the
4481 statute are necessary measures in relation to the welfare of the public."

In *Mitchell v. Taylor*, 3 Cal. (2d) 217, in considering the question whether the insurance commissioner who had been appointed liquidator of an insurance company was exempt from payment of certain fees under the provisions of section 4295 of the Political Code, that:

"The state or any public officer acting in his official capacity on behalf of the state shall not
4482 be required to pay or deposit any fee."

It was contended that the insurance commissioner in taking charge of the business of an insolvent company acts as the trustee of a private trust on behalf of the private persons who are the ultimate owners of the trust property. The court said:

"We are unable to agree with the contention which ignores the basic purpose of the law under which the office of insurance commissioner is

4483 created. That law provides that when there is insolvency or such situation as would make the further transaction of business by the insurer hazardous to its policyholders, its creditors, or to the public, the commissioner with the aid of the attorney general shall institute a proceeding in the Superior Court placing him in possession of the company's property and seeking such other order as the interest of the policyholders, creditors and public may require."

4484 Citing Deering General Laws 1931 at 3739, section 2, this decision having been rendered prior to the enactment of the present code.

"Other provisions give him wide powers to carry out this purpose. There can be no doubt that the statute was enacted under the police power for a purpose connected with the public interest. That the Legislature has declared the liquidation of insolvent insurance companies a matter in which the state has an interest and that consequently it has made provision for a state officer to protect and advance that interest. The insurance commissioner is not a mere private trustee or receiver wholly dependent on the appointing court for his power, he is a state officer performing duties enjoined upon him by statute and in every performance he acts on behalf of the state."

4485

In the case of the State v. Superior Court, 97 Pacific, reported at 774, cited by counsel for the

4486 Washington insurance commissioner, the Supreme Court of the state of Washington held by a five to four decision that the law relating to the appointment of the director of efficiency, a state officer, as receiver for savings and loan associations for the sole purpose of dissolution of the company did not repeal the act granting the Superior Court exclusive authority to appoint a receiver, and that the statute there involved did not create a statutory receiver. With this the
4487 four dissenting justices did not agree and expressed themselves in the following language:

"My view is that the statute here in question contemplates a mixture of both. That is, the state names a receiver and requires the court to appoint as such receiver the person named, and that the interference of the court with the administration thereafter can only be where the receiver himself comes into court and seeks direction as to some particular question or where
4488 some one feeling aggrieved at the action of the receiver may come into court and there have his complaint determined."

This case was cited as authority on the point that this court, as a court of equity, retains its full power to control the action of the insurance commissioner in the same manner as that it could control the action of a receiver. I call special attention to the fact that the statute construed by the Supreme Court of Washington was lim-

ited solely to the appointment of the efficiency director for the purpose of dissolution of a company. He had no other power at all. Naturally the full equity powers of the court with respect to receivership survived, just as it did in California in the early days before we got our new provision. I quote this language of the dissenters in that case which I fully believe would have been joined in by the majority if it had been a case like this where there was a statutory receiver because it clearly expresses the trend of thought as to what the Legislature meant when it granted to the state official the power to use his discretion in how to handle the business of a company taken over.

In the case of *Gallen v. Burdick,* 173 N. Y. S. 456, in construing a New York statute of almost identical character as the California act, the New York court of first instance stated:

"The superintendent of insurance is, in effect, a statutory receiver. His power has been upheld in the Court of Appeals, People by Van Schaick v. Title & Mortgage Guaranty Company of Buffalo, 264 N. Y. 69. The court there said:

" 'The superintendent becomes a statutory receiver. The property of the corporation is brought into the protective arm of the law, and the receiver is subject to directions of the court, except in so far as discretionary power is vested by the Legislature in him.' "

In the case of *In re National Surety Company*, 268 N. Y. S. 88, at page 95, the New York court declared:

"The Legislature had the power to permit the superintendent of insurance to liquidate or rehabilitate such company; but the extent to which that power shall be used must be supervised by the courts. The statute places a great responsibility upon both the superintendent of insurance and the courts, and requires the exercise of proper discretion. However, any abuse of power may be checked by an application to the court."

In the case of *In re Globe v. Rutgers Fire Insurance Company*, 266 N. Y. S. 29, the New York court stated:

"Ordinarily the court would be constrained to adopt the views of the superintendent of insurance, who has made a very detailed investigation of the insurer's affairs. The court has great confidence in his judgment, and recognizes that the recommendations and views of an administrative officer, charged with the performance of statutory duties, are entitled to great weight and careful consideration, and are not to be disregarded or brushed aside except for cogent reasons."

In the case of *In re National Surety Company*, at 288 N. Y. S. 1014, on an appeal from an order made by the lower court disapproving the insurance superintendent's acceptance of a highest bid

4495 for stock of a new company organized under a rehabilitation plan, and which order directed him to accept an amended bid—not on the ground that the bid accepted was inadequate, but on the ground that acceptance of the amended bid was to the best interests of the estate of the company and rehabilitation, the New York court had this to say:

"Instead of approving or disapproving the acceptance of bid of appellant, the court entered
4496 the order now under review. We fail to find anything in section 421 of the Insurance Law which gave the court the right to make an order, this unusual order. The result of what the court has done was to substitute its judgment for that of the superintendent's. Such a procedure was not even contemplated by the Legislature in enacting this particular statute."

It is a well-settled rule that the statute of
4497 another state which has been construed by the courts of that jurisdiction, when adopted in California it will be presumed to have been adopted with the construction so given it, unless the language is changed somewhat to express a different intent. In construing such a statute, the decisions of the courts of the state from which the statute was derived are entitled to great consideration, and their interpretation of the statute will ordinarily be followed.

4498 There is another rule, well-known, which is analogous to this, namely, that the exercise by a trial court of discretionary powers will not be reviewed or disturbed on appeal except for an abuse of discretion. Unless the appellate court is able to say that a clear abuse of discretion is made to appear, it will not substitute its opinion, and thereby divest the trial court of the discretionary power reposed in it. And it has been repeatedly held, until it is never challenged, that
4499 no court will by mandamas seek to compel a public official to perform a duty of his office in any particular way where the statute gives to that official the right to use his discretion. Neither will the court prohibit any public official who is given the power to use his discretion under the statute from exercising that discretion as he sees fit, unless there is a showing, in each of these cases that, in the exercise, or the attempted exercise of the power, the official has abused, misused
4500 that power of discretion.

Here we have a case where the Legislature has vested in the insurance commissioner, as conservator, the power to conduct the business of the affected life insurance company. It has vested in him the power to determine, in the first instance, under the exercise of discretion, how he shall conduct that business. It has given to him this new and additional authority, to use the means of rehabilitation in connection with the conduct of that business, to the end that the affairs of the

company may be restored to a state of solvency and the property and assets of the company be transferred and possession thereof delivered to them for the continuation of the regular business.

I can see no escape from the conclusion that the Legislature intended to turn over to the insurance commissioner the control and the management of a life insurance company found to be in the situation in which this company was found; and the right to undertake to rehabilitate that company, rather than liquidate it; and that, in so doing, the Legislature has put it out of the power of any court to deny him the free exercise of that power, as long as he is not abusing it.

That leaves here, then, just the one question: Can it be said that there is here in this evidence, that within its pages there is contained in this rehabilitation plan proof that it is unfair, unjust or unreasonable, arbitrary or capricious?

We sat here for many, many days listening to the testimony of men who knew whereof they spoke. The Commissioner himself has demonstrated, while on the witness stand as a witness, under the barrage of questions propounded to him, that he need not rely, nor need the court rely, on the presumption that he is acting fairly, or that he possesses the skill and knowledge which entitles his views and his opinions to great weight. He demonstrated that he is familiar with the life insurance business, and he has di-

rectly stated, without qualification, that, in his opinion, this plan will work, and will effect a rehabilitation of the Pacific Mutual Life Insurance Company of California. In that opinion he was substantiated by the testimony of Mr. Breiby. We must all concede, one to the other, that in such obscure matters as pertain to the actuarial aspect of the life insurance business, we know very little; so little that our own personal judgment is worthless. So we have to look to those who do know. The best officials of the best life insurance companies in the world do not depend on their own judgment in matters affecting actuarial work. They depend and rest blindly upon the opinions of their actuaries. The only judgment they exercise is in their choice of their actuaries. Mr. Breiby is one who has demonstrated that he knows whereof he speaks. His opinion is that this contract is fair, from the insurance point of view it is just and equitable; he says it will work. That opinion, that view stands practically unchallenged. This court would be arrogating an authority and a power entirely inconsistent with the duties of a court if it sought to set up its puny judgment against that of men like the Insurance Commissioner and Mr. Breiby. The court must take those opinions as true. After all, does the proposed plan of the Commissioner discriminate wrongly against anybody? The only difference between the plan of rehabilitation and the plan of reinsurance in liqui-

dation is that the non-can active policyholders will get at the beginning less than under the Giannini plan. Mr. Breiby testified that under the set-up taken from the company's books that at the end of 1937 the company would be able to pay that group in the lowest bracket of 20 per cent over 50 per cent. The Giannini offer starts off with 50 per cent; the Giannini offer also contains the element of cash, new money. We shouldn't let that blind us to the merits of the plan adopted or selected by the officer placed in charge of this institution. New money tempts one instantly to say "That is the better plan." Undoubtedly throughout the public and those interested in these policies the impression will first be that it is the better plan. If we who have been here engaged in this investigation now for nine weeks cannot definitely decide which is the better plan, it would be well for those on the outside who know very little not to make any decision at all. Furthermore, it is not necessary that this court attempt to weigh one against the other. I recognize the purpose for which the Giannini plan was offered, a commendable public service offer, given in utmost good faith, accepted as a matter of proof here of the purpose and intent of those who made that offer and are backing it, those who support it here among the interveners seeking the best way to protect life insurance and those who have policies in this particular life insurance company. On the other hand,

4510 the plan of the Commissioner chosen by him, presented to the court for its approval, is shown by the proof to be workable and that it is prepared and presented for the purpose for which the Commissioner was appointed, is fully within the purview and intent of the legislation enacted in 1935.

Now, let me say this: All of the proceedings are predicated upon the proposition that the Pa-
4511 cific Mutual Life Insurance Company of California is insolvent and that it would be hazardous to the public and policyholders to permit it to further continue business. I have gathered from the evidence in this case a firm conviction that the Pacific Mutual Life Insurance Company of California is not stricken by any serious or ruinous condition. In the commercial sense of the word it is not insolvent; it was able to meet its
4512 obligations as they fell due up to the time the Commissioner took it over and would have been so able for years in advance had it not been taken over, but the law has prescribed certain standards of reserves to be set up for the protection of the public who deal with life insurance companies. That standard applied by the State Commissioner in the exercise of his duty revealed the fact last spring that the reserves were inadequate; therefore, under this artificial definition of in-

4513 solvency the company was insolvent, and being insolvent in that sense, of course it would be hazardous to permit it to continue its business, and it was the duty of the Commissioner to take it over. A company that has existed for sixty-eight years, developed a reputation of being a giant of insurance in the West, $600,000,000.00 of insurance written, 300,000 policyholders, 3800 stockholders, sixty or seventy general agents scat-
4514 tered throughout the country, with assets of a tangible nature exceeding $215,000,000.00, with assets of an intangible nature, such as good will and specially the organized agency force, of many more millions, certainly is not an ailing institution; it is not liable to collapse. In order to restore it to those standards which the law prescribes, the Commissioner had to take it over, and to the Commissioner was given the power to
4515 conduct its business and to rehabilitate, if possible; he has chosen to rehabilitate. I find no abuse of discretion at all on his part in adopting that course. I have a firm feeling of conviction in my mind that this plan of his will succeed. The policyholders will want it to succeed; and when you stop to consider that there is a mere bagatelle of those holding policies that will ever suffer at all even temporarily, as provided, it is

4516 bound to result that substantially all policyholders will want it to succeed. The Commissioner has shown that already there has been a saving of half a million dollars per annum in the overhead of this company. That is cited simply as evidence of what good a state can do when it steps in and takes over. Many other economies can be practiced, better methods adopted. Under the plan it will be under the supervision of the state
4517 official at all times, and that means the supervision of the state, and to relegate it to its farthest extremity, that means that the people of the state of California are conducting that business under the authority of those decisions which grant to the Insurance Commissioner the discretion of adopting the method by him considered to be the best, and that method here being this proposed plan of rehabilitation as evidenced in the
4518 concrete form by this proposed contract ready to be executed. It follows that it is the duty of this court to approve the plan and to quote a classic:

"The law allows it and the court don't grant it."

The motion made by Mr. Lee for the Tilton group of interveners to discharge the order to show cause and that the conservator's plan be not approved will be denied. The same motion made

4519 by Mr. Dottenheim on behalf of the Hall and McManus group will be denied.

The motion made by Mr. Overton to dismiss the proceedings will be denied.

The prayer of Mr. Neblett, intervener, for an order of liquidation, will be denied.

The petition of the Commissioner as conservator for the approval of the plan and agreement
4520 will be granted.

The Attorney General will prepare appropriate forms of order.

Mr. Lee: Findings and decree, I take it?

The Court: No findings and no decree.

Mr. Lee: On behalf of the E. B. Tilton respondents a demand for special findings is hereby made on the issue joined by the answer of said
4521 respondents. Is that request denied, Your Honor?

The Court: Yes.

Mr. Lawler: We ask for an exception to be entered on behalf of the parties represented by Mr. Judson and myself.

The Court: Very well.

Mr. Lee: May an exception be noted also on behalf of the Tilton group? I think the order

should provide an exception is reserved to all aggrieved parties, which is the federal practice, as Your Honor is aware of.

The Court: Do all parties here aggrieved desire exceptions noted?

Mr. Dottenheim: I wish mine to be noted, Your Honor.

Mr. Doherty: I don't know of any procedure requiring it, but from the standpoint of safety I wish Your Honor would note on behalf of those whom I represent.

Mr. Lee: I think it should be noted for all those aggrieved.

The Court: Very well, an exception is noted on the record by all parties feeling themselves aggrieved.

Mr. Lee: May it be included in the order, which is the usual practice—

Mr. Flynn: I think the record itself should note the exception, and I don't believe that is under our practice a part of the order.

The Court: The order is simply the order which is on the minutes and it is in the reporter's record.

(Adjournment.)

L. A. No. 16182. In Bank. December 7, 1937

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, Petitioner and Respondent,

v.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA (a Corporation), Respondent; William H. Neblett, Vernon Bettin and William George Dickinson, Appellants and Respondents; Charles Ross Cooper et al., Respondents

L. A. No. 16222. In Bank. December 7, 1937

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, Petitioner and Respondent,

v.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA (a Corporation), Respondent; Alfred F. MacDonald, Appellant and Respondent; Charles Ross Cooper et al., Respondents

[1] Appeal—Briefs—Motion to Strike.—An appellate court has the power to strike from its files a brief or other document containing disrespectful, scandalous or abusive language directed against the courts, officials or litigants, or to take such other action as the circumstances may require.

[2] Id.—Briefs—Issues—Motion to Strike.—In this proceeding for approval of a plan of rehabilitation of an insurance company proposed by the state insurance commissioner, although the brief of one appellant made many charges and insinuations which could be supported, if at all, only by reference to the evidence which was not included in the record on appeal, and many of the charges were couched in highly intemperate and improper language, which under no circumstances of the case could be sanctioned, where the issues involved were of widespread in-

terest and public importance, and several of the contentions made could be properly considered only by a reference to the challenged brief, the ends of justice would best be served by refusing to strike said brief from the files, and a motion to strike was denied.

[3] Insurance — Insurance Carriers — Reorganization — Procedure—Orders—Appeal.—In this proceeding seeking approval of a plan of rehabilitation of an insurance company proposed by the state insurance commissioner, the filing of the petition for approval of the rehabilitation plan did not constitute an institution of a new proceeding separate and apart from the steps theretofore taken by which the insurance company was taken over by the insurance commissioner, and on appeal from the order approving the plan submitted by the commissioner the judgment roll, and therefore the proper appeal record, started with the petitions and orders first filed and made, and orders made prior to the order from which the appeal was taken were subject to review.

[4] Id.—Disqualification of Judges.—Ownership of a life insurance policy, when such ownership gives the judge an interest in the funds of the insurance company, disqualifies such judge from participating in or deciding any cause or proceeding to which the insurance company is a party; and in such proceeding, all orders made by a judge who held a policy of life insurance in the insolvent insurance company were void by reason of his disqualification.

[5] Id.—Disqualification of Judges—Orders.—In such proceeding, although all orders made by one judge who held a policy of life insurance in the insolvent company were void, this in no way affected the validity of any subsequent proceedings before another judge who was not disqualified where not only were all the facts performed by the insurance commissioner ratified, confirmed and approved by valid orders after a full hearing by the judge not disqualified, but the insurance commissioner was entitled under the Insurance Code to take possession of the assets of an insolvent insurance company without a prior court order.

[6] Id.—Appeal—Judgment Roll—Findings—Waiver.—In such proceeding, even if it were to be assumed that the proceeding was one in which findings were required, the re-

quirement was one which might be waived, and where the appeal was taken on the judgment roll, it was to be assumed, in the absence of a proper record showing the contrary, in support of the judgment, that such requirement was waived.

[7] Id.—Appeal—Findings—Record.—In such proceeding, where the appeal was taken on the judgment roll alone [fol. 1510] and a purported colloquy between counsel and the trial judge following the oral opinion of the trial judge, printed at the end of the last volume of the transcript, was not properly made a part of the appeal record, and the purported comments were not certified, appearing in the transcript after the formal certification by the clerk, such comments and oral opinion were not a proper part of the record and could not be considered, and the defect could not be cured by an affidavit of an attorney, attached to a brief, to the effect that the opinion and conversation were copied from a certified copy of the court reporter's transcript.

[8] Id.—Special Proceedings—Findings.—When a statute dealing with a particular special proceeding is silent as to the requirement of findings, none is required; and in such proceeding, where the portions of the Insurance Code providing for the reorganization and rehabilitation of insolvent insurance companies contained no provision requiring findings in such a special proceeding, no duty rested upon the trial court to make findings of fact.

[9] Id.—Public Interest—Impairment of Contract—Police Power—Constitutional Law.—The business of insurance is affected with a public interest and the state has an important and vital interest in the liquidation or reorganization of such a business, and neither the company nor a policy holder has the inviolate rights that characterize private contracts, but the contract of the policy holder is subject to the reasonable exercise of the state's police power, the only restriction on the exercise of which is that the state's action shall be reasonably related to the public interest and shall not be arbitrary or improperly discriminatory.

[10] Id.—Police Power — Insurance Carriers — Insolvency.—Under the statutory plan embodied in the Insurance Code, the state, acting under and within its police power, has provided that the insurance commissioner when

an insurance company is in financial difficulties shall first be appointed by the court as conservator, and as such it is his duty to operate the company and try to remove the causes leading to its difficulties, but if this cannot be done he then must attempt to rehabilitate the business of the company as conservator or regulator by entering into, with the court's approval, either reinsuring or rehabilitation agreements, and only if this cannot be done and further efforts would be futile should resort be made to liquidation.

[11] Id.—Insurance Carriers—Reorganization—Insurance Code.—In such proceeding, the insurance commissioner had the power under the provisions of the Insurance Code, with the approval of the superior court, to effect a rehabilitation of the insolvent insurance company by the organization of a new insurance company and a transfer of the assets of the old company to the new company upon the conditions recommended by him and approved by the court, and there was no merit in the contention that the Insurance Code did not permit the rehabilitation of an insolvent company by the organization of a new company.

[12] Id.—Words and Phrases—Reinsurance.—In such proceeding, the contract by which the new company took over certain insurance risks of the old company and became substituted as insurer in the place and stead of the original insurer effected a "reinsurance" of the business of the old company, and there was no merit in the term "reinsurance" as used in the Insurance Code meant only that one company was to reinsure the risks of another, the latter remaining liable on the original risk.

[13] Id. — Contracts — Discrimination — Constitutional Law.—In such proceeding, where all policy holders, including the holders of life insurance policies and noncancellable accident and health policies, were given the right to consent to or reject the reorganization in so far as it affected them, and all those who rejected the plan were placed upon the same footing and were entitled to receive the liquidated value of his contract rights without reasonable delay, and the plan of reorganization submitted appeared from the record to be the best plan to bring about an effective reorganization, there was no merit in the contention that the reorganization plan was unlawfully discriminatory in that life

policy holders were taken into the plan on more liberal terms than non-can policy holders.

[14] Id.—Insurance Carriers—Insolvency—Fraudulent Conveyances.—In such proceeding, sections 3439 and 3442 of the Civil Code had no application, and where the transfer of assets by the insurance commissioner was made by him as such, and not by the insolvent company to the newly organized company, with the full approval of the superior [fol. 1511] court, there was no merit in the contention that such transfer constituted a fraudulent conveyance in violation of said sections 3439 and 3442.

[15] Id.—Insurance Commissioner—Conveyances.—In such proceeding, the insurance commissioner, as conservator or liquidator, had the power with court approval to enter into rehabilitation agreements, and it was immaterial that he had not been validly appointed liquidator before making the conveyance to the new company.

[16] Id.—Insurance Carriers—Permits—Appeal—Judgment Roll.—In such proceeding, the insurance commissioner was not required to issue to himself a permit for the issuance of stock in the new company where courts approval of the issuance was contemplated and secured; furthermore, where the record on appeal failed to show that such permit, if one was necessary, was not secured, it was to be conclusively presumed that such permit was secured.

[17] Id.—Insurance Commissioner—Constitutional Law.—In such proceeding, the insurance commissioner, while subscribing to the stock in the new insurance company as conservator for the old company, did not, as a state officer, subscribe to the stock of the new company so as to make the state a stockholder and there was no merit in the contention that section 1043 of the Insurance Code and the plan as approved were in violation of section 13 of article XII of the Constitution, prohibiting the state from subscribing to the stock of any company, association or corporation.

[18] Id.—Insurance Carriers—Corporations—Names.—In such proceeding, while the new company was a stock company, where the new, as well as the old company was authorized to issue participating life policies as well as non-participating policies, and the record showed that the approved plan provided for the ultimate mutualization of the

company on certain designated conditions, and the word "mutual" was a part of the name of the old company, whether the facts justified the use of the term "mutual" in the new company's name was a question for the consideration of the trial court, and the contention that the use of such word in the name of the new company was misleading, illegal and fraudulent, in that the company was not a mutual company, could not be sustained.

[19] Id.—Issues—Appeal—Judgment Roll.—In such proceeding, where the appeal was taken on the judgment roll alone, and the different plans for reorganization submitted to the trial court were not included in the record on appeal, the appellate court could not determine the relative merits of any of the submitted plans, and the judgment of the trial court thereon was conclusive.

Appeal by certain respondents from an order of the Superior Court of Los Angeles County, Henry M. Willis, Judge, affirming a plan of rehabilitation of an insurance company proposed by the State Insurance Commissioner. Affirmed.

For Appellant and Respondent Alfred F. MacDonald—Alfred F. MacDonald, in propria persona.

For Appellant and Respondent William H. Neblett—William H. Neblett, in propria persona; R. Dean Warner, LeRoy B. Lorenz, E. Walter Guthrie, A. H. McCurdy.

For Appellants and Respondents Vernon Bettin and William George Dickinson—Bettin, Painter & Wait; Vernon Bettin, in propria persona.

For Respondent Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California—U. S. Webb, Attorney-General; John L. Flynn, Deputy Attorney-General; Shepard Mitchell, Mitchell Silberberg, Roth & Knupp and Peery Price, Frank L. Guerena.

For Respondent Pacific Mutual Life Insurance Company of California, a Corporation—O'Melveny, Tuller & Myers; Overton, Lyman & Plumb.

For Respondents Charles Ross Cooper et al.—Hugh K. McKevitt.

For Respondents Rupert B. Turnbull et al., for themselves and for other noncancellable Policyholders similarly [fol. 1512] situated and for Francis Adams for himself and

for other noncancellable Policyholders similarly situated—Rupert B. Turnbull.

For Respondents George W. Manierre and B. Robert Getts on their own behalf and on behalf of all similarly situated Policyholders—Manierre & Cuthbertson.

For Respondents E. B. Tilton et al.—Kenyon F. Lee.

For Respondents Marshall D. Hall and Joseph C. McManus on behalf of themselves and other holders of noncancellable Income policies—H. S. Dottenheim.

For Respondents Neil S. McCarthy on his own behalf, Ralph R. Huesman and Broadtown Investment Company, a Corporation—Neil S. McCarthy.

For Respondents Dr. Arthur B. Allen et al.—W. B. Etheridge.

For Respondents David Lynn Openshaw et al.—Delvy T. Walton.

For Respondent Henry B. Senn—Albert E. Coger.

For Respondent Herbert E. Freston—Herbert E. Freston, in propria persona.

For Respondents Robert J. Webb and Philip M. Klutznick for themselves and all other persons similarly situated—Jacob J. Lieberman, Aaron B. Rosenthal.

For Respondent R. Rabinowitz—Lawler & Felix.

For Respondent Roscoe R. Hess—Roscoe R. Hess, in propria persona; David R. Rubin.

For Respondents G. C. Parsons, J. A. Marvin and G. R. Snider et al., on behalf of themselves and all other holders of noncancellable policies, and as members of a Protective Committee for Holders of Noncancellable Income Policies—Chapman, Snider, Duke & Landis; Hiram W. Johnson, Jr., Frank P. Doherty.

For Respondents Austin O. Martin and Rex Hardy—Rex Hardy.

For Respondent William A. Sullivan, Insurance Commissioner of the State of Washington—Ivan Merrick.

For Respondent Arthur E. White—Arthur E. White, in propria persona.

For Respondents George I. Cochran et al.—Oscar Lawler, Harold Judson.

For Respondents William A. Beckett et al.—Shattuck, Davis & Story.

For Respondent Arthur D. Wunner—Paul Overton.

For Respondents C. N. Wesley et al.—Latham, Watkins & Bouchard.

For Respondents Wilbur G. Katz et al.—Bell, Boyd & Marshall; Newlin & Ashburn.

For Respondents Carl C. Katleman et al., for himself and all others similarly situated—Carl C. Katleman.

For Respondent Andrew J. Copp, Jr.—Andrew J. Copp, Jr., in propria persona.

For Respondent Ralph C. Hamlin—Garnet C. Rainey.

For Respondents Rowe Sanderson et al.—Chapman & Chapman.

For Respondents Robert Casamajor et al.—Hahn & Hahn.

For Respondent Ben S. Hunter—Ben S. Hunter, in propria persona.

For Respondents Clara M. Gannan et al.—M. W. Purcell. [fol. 1513] For Respondent John P. Oliver—John P. Oliver, in propria persona.

For Respondents Harold S. Cook et al.—Loeb, Walker & Loeb.

For Respondents Edwin Janss et al.—William M. Rains.

For Respondent E. A. Conway, Secretary of State of Louisiana—D. M. Ellison.

For Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel—John M. Cramer, Cosgrove & O'Neil.

For Respondents J. Parker Evans, on behalf of himself and all other holders of active life noncancellable income policies issued in the State of Alabama who may wish to join with him in the proceeding—A. A. Carmichael.

Amicus Curiae—Asa V. Call.

By the COURT:

The above numbered appeals have been taken by the four named appellants, policyholders of the Pacific Mutual Life Insurance Company of California, from an order of the superior court in and for the county of Los Angeles, affirming a plan of rehabilitation of that company proposed by the state insurance commissioner pursuant to the provisions of section 1043 of the Insurance Code. (Stats. 1935, chap. 145; Deering's 1936 Supp. to Codes, Laws and Con. Amendments, Act No. 3748, p. 878).

In appeal L. A. No. 16182, and solely in connection with appellant Neblett, a motion of respondents Day, Fabling, Gantz, Paschall and Wetzel to strike the opening brief of

appellant Neblett from the files has been submitted to be decided with the cause on its merits. The motion is made on the ground that the challenged brief contains disrespectful and impertinent language directed against two judges of the trial court, against the attorney-general and his deputies, and against the insurance commissioner. Neither the insurance commissioner nor his counsel has joined in this motion.

Mr. Neblett is an attorney of long standing. In the court below he appeared by counsel, but on this appeal filed the challenged brief in propria persona. No useful purpose would be served in setting forth in detail the charges and objectionable matter found in the brief. The appeal is taken upon the judgment roll. None of the evidence introduced below is before us. Notwithstanding this fact appellant Neblett has made many charges and insinuations which could be supported, if at all, only by a reference to the evidence. While he contends that his charges are supported by the judgment roll, an examination of the record discloses that his contentions are not supported therein. If evidence was introduced below on these matters, and appellant Neblett desired to discuss them, he should have brought the record before us. This he has not done. The reference thereto in the brief, under the circumstances, is unjustified. Moreover, many of the charges are couched in highly intemperate and improper language which under no circumstances of the case could be sanctioned.

[1] There can be no doubt of the power of an appellate court to strike from its files a brief or other document containing disrespectful, scandalous, or abusive language, directed against the courts, officials, or litigants, or to take such other action as the circumstances may require. (Estate of Randall, 177 Cal. 363; Gage v. Gunther, 136 Cal. 338; San Diego Water Co. v. San Diego, 117 Cal. 556; Sears v. Starbird, 75 Cal. 91.) The experience of attorney Neblett [fol. 1514] has been such that it must be assumed that in presenting the improper argument to this court he was mindful of the significance of the language used. [2] In view of the widespread interest in, and the public importance of these causes, and in view of the fact that several of the contentions made can only be properly considered by a reference to the challenged brief, we think the ends of justice would best be served by denying the motion to strike.

As already stated, the appeals are upon the judgment roll. That record consists of over 1450 printed pages. In order to understand the contentions of the parties it is necessary to briefly summarize, chronologically, the contents of the judgment roll.

On July 22, 1936, there was filed in the court below by Samuel L. Carpenter, Jr., as insurance commissioner of the state of California, a petition entitled, "Application for Order Appointing Conservator". The petition recites that the Pacific Mutual Life Insurance Company of California is a California corporation engaged in the business of life, health and accident insurance in this and other states; that the commissioner, pursuant to his statutory duty, together with a number of insurance commissioners from other states, has made a convention examination of the business of the named insurance company as of December 31, 1935, a copy of the report being annexed to the petition; that such examination disclosed that the company's affairs are such that its further transaction of business would be hazardous to its policyholders, its creditors and to the public; that the company is insolvent within the meaning of that terms as defined in the Insurance Code; that the hazardous and insolvent condition is principally caused by reason of the fact that for many years the company has issued a large number of noncancellable accident and health policies (hereafter referred to as non-can policies) at a rate inadequate to maintain the lawful reserves behind such policies; that it is necessary that the commissioner be authorized to immediately take possession of all the assets of the company for the purpose of conserving them in the interest of all the policyholders, creditors and stockholders and the public in general; that it is necessary that the commissioner be appointed conservator and that certain described restraining orders permitted by the Insurance Code be issued. It is further alleged that the insurance company has assets in excess of $200,000,000 and has obligations on policies issued in excess of $600,000,000, insuring the lives and health of policyholders in excess of 200,000 persons; that in addition the company has outstanding in excess of 75,000 accident and health policies; that because of the magnitude of the business it is proper as a matter of public policy that petitioner be authorized and directed to work out a rehabilitation and reinsurance plan to protect the interest of all. The attached

report of the convention examination discloses that as of December 31, 1935, there was a deficiency of approximately $23,000,000 in the reserves behind the non-can policies, but that as to its life and other policies the company was in a sound position. The report likewise discloses that the difficulties of the company were largely caused by the sale of non-can policies at an inadequate premium rate.

On the same date the insurance company filed its appearance and consent that the cause might be immediately presented and tried, and likewise consenting to the relief prayed [fol. 1519] for by the commissioner. The matter was therefore presented to Judge Edmonds, then judge of the Los Angeles county superior court, and on July 22, 1936, he issued an order appointing Carpenter conservator of the company and granting the other orders prayed for in the petition.

Immediately thereafter, and on the same day, Carpenter filed an "Application for Order to Liquidate", reciting his appointment as conservator; that the company is insolvent; that further efforts to proceed as conservator would be futile; that the best interests of all concerned would best be served by appointing him liquidator; that in order to preserve the valuable intangible assets of the company, such as its good will and its agency organization, it is necessary that a rehabilitation and reinsurance plan be worked out. The commissioner prayed that he be appointed liquidator; that his title as conservator be confirmed; that he be authorized and directed to work out a rehabilitation and reinsurance plan; and that certain restraining orders be issued. The company having filed its consent to the making of the order, Judge Edmonds, on July 22, 1936, granted the petition appointing Carpenter liquidator and granting the other relief prayed for substantially in accordance with the prayer of the petition.

Immediately thereafter, and on the same day, there was filed by the commissioner a "Petition for Order Permitting, Approving, and Authorizing Rehabilitation, Sale and Transfer of Assets, and Reinsurance Plan and Agreement of the Pacific Mutual Life Insurance Company of California". The petition recites the steps already taken, and that, pursuant to the prior orders, the commissioner has worked out a rehabilitation and reinsurance plan, a copy of which is attached, and prays for its approval. The proposed plan

(which as slightly modified is the plan the approval of which is challenged on these appeals) so far as now pertinent, provided for the organization by the insurance commissioner of a new corporation to be known as the Pacific Mutual Life Insurance Company with a capital of $1,000,000 consisting of 10,000 shares of the par value of $100 each; for the commissioner to purchase all of the outstanding stock of this new company with assets of the old company for $3,000,000; for petitioner to transfer to the new company substantially all of the other assets of the old company, excepting the stock of the new company; and for the new company to agree by contract to assume all the policies and obligations of the old company to the extent provided in the agreement. Under this proposed contract the new company was to agree to reinsure all life policies on exactly the same terms as such policies had been issued by the old company. Any life policyholder not assenting to the plan was to file a claim with the commissioner as liquidator of the old company, all allowed claims to be paid by the new company as limited in the agreement. As to non-can policyholders, the new company was to agree to assume and to reinsure their policies at existing premium rates, but disability payments on such policies were to be assumed on a basis of from 20 per cent to 90 per cent of the face of such policies depending upon the year of issue. Certain provisions were incorporated in the proposed agreement for future increased benefits to be paid to consenting non-can policyholders from certain profits of the new company. Nonconsenting non-can policyholders were to file claims with the commissioner as liquidator of the old company, all [fol. 1516] allowed claims to be assumed by the new company as provided in the agreement. The petition for the approval of this proposed plan of rehabilitation alleged that if it were approved the business formerly carried on by the old company could continue without interruption and the intangible assets such as good will and agency organization would, so far as possible, be preserved.

On July 22, 1936, after notice to the old company and the filing of its consent, and after finding that the plan was fair and equitable to all concerned, Judge Edmonds made an order permitting and approving the proposed plan and authorizing the execution of the proposed agreement and the transfer of the assets as therein provided.

On July 23, 1936, the commissioner petitioned for approval of an amendment to the rehabilitation plan, the court's jurisdiction having been retained in the order of July 22d. The amendment was approved and authorized by order of Judge Edmonds made and entered the same day.

On July 23, 1936, the new company filed a "Petition for Intervention and for Order to Show Cause". The petition recited the proceedings already taken, and the fact that pursuant to order of court the new company had been organized and the rehabilitation agreement executed. The new company petitioned for leave to intervene for the purpose of having its title to the assets of the old company and all the other steps already taken confirmed upon hearing of an order to show cause to all interested. On the day this petition was filed, Judge Edmonds granted the petition to intervene and ordered all interested to show cause on a day certain why all actions already taken by the court or by Carpenter pursuant to the prior orders should not be ratified, confirmed and approved.

Shortly after July 23d, various persons—stockholders, policyholders, or directors of the old company—in response to the order to show cause filed complaints in intervention. All requested that the prior orders be set aside, attacked the provisions of the Insurance Code under which the orders had been made as unconstitutional, and attacked the rehabilitation plan as being unfair, discriminatory, and illegal.

On August 11, 1936, Judge Willis, judge of the superior court of Los Angeles county, made an "Order Appointing Conservator and Restraining Order". It is therein recited that on July 22d a petition of Carpenter to be appointed conservator was filed and granted by Judge Edmonds; that since that date Judge Edmonds had advised the court that he is the holder of a life policy in the old company in sum of $5,000; that because of the doubt as to Judge Edmonds' qualifications because of the ownership of such policy it appears advisable to the court that it should rehear and reconsider the petition. The court thereupon decreed that the order of July 22d of Judge Edmonds appointing Carpenter conservator be "ratified, approved and confirmed; and that said order and said restraining order be and they are now hereby adopted and continued in force". In addition, however, the court ordered that Carpenter "be and

he is hereby appointed conservator of said respondent corporation, its business, assets, and affairs, and that said commissioner be and he is hereby ordered to take possession forthwith of all the books, records, property, real and personal, and assets, wheresoever situated of said respondent corporation, and to conduct, manage, transact and [fol. 1517] operate the business and affairs of respondent as a going insurance business, and to do any and all things which the petitioner may deem necessary and appropriate for that purpose". The court also ordered Carpenter as conservator to work out a rehabilitation and reinsurance plan, and issued the requested restraining orders. The court concluded its order with the statement that the making of this new order did not constitute a revocation of the orders made by Judge Edmonds nor a ruling with respect to his qualifications. It is to be noted that by this order of August 11th, Judge Willis not only purported to confirm and ratify the prior order of Judge Edmonds, but also made his own order appointing Carpenter conservator of the old company.

On August 13th, Carpenter, as conservator, petitioned to be appointed liquidator, which petition so far as the record here presented is concerned, never has been acted upon. On August 14th, Carpenter filed a "Petition with Respect to Rehabilitation, Sale and Transfer of Assets and Reinsurance Plan and Agreement", in which after reciting the prior steps taken and the doubt in reference to the validity of the orders made by Judge Edmonds, Carpenter asks for confirmation of his prior acts, and authorization to proceed. Apparently no further steps were taken in reference to this petition.

Thereafter the commissioner and the new company filed answers to the many pleadings filed by interveners and others. Between August 14th and August 29th, many other parties and groups of parties responded to the order to show cause and filed objections to the confirmation of the plan. On August 29th, the trial court through Judge Willis made and entered its order granting the petition of the new company to intervene as of the date of the filing of its petition, July 23, 1936, and adopting and ratifying the Edmonds' order to show cause. Thereafter many other parties appeared and filed pleadings objecting to the plan of rehabilitation.

We now come to the start of the specific proceedings ultimately resulting in the specific order here sought to be reversed. On September 25, 1936, Carpenter as conservator filed a "Petition for Approval of Rehabilitation and Reinsurance Agreement". By this petition the commissioner, pursuant to the orders of Judge Willis of August 11th, sought approval of the rehabilitation plan worked out by him. The petition recites substantially the same facts already reviewed in connection with the similar petition filed on July 22, 1936. It is further recited that pursuant to court order Carpenter as conservator has taken possession of the business and assets of the old company, and has carried on the business of the old company; that it is in the interests of all concerned to preserve the good will, the agency organization and the going concern value of the old company; that in order to accomplish these ends the commissioner organized the new company and on July 22, 1936, purchased all its stock with $3,000,000 of old company funds, and on the same date transferred to the new company all the other assets of the old company except the stock of the new company and certain described claims; that "since said July 22, 1936, your petitioner, as conservator, and through the agency and instrumentality of the new company, has continued to carry on and conduct the business and affairs of the old company, and to preserve, so far as possible, its good will, [fol. 1518] going concern value, and agency organization." The petitioner also recites that as conservator he has given diligent study and attention to the problem of determining what steps would best serve the interests of all concerned; that he has invited the presentation of plans and offers; that he has carefully examined and considered all plans and suggestions submitted to him for the rehabilitation of the old company, or the reinsurance of its business; that "in the opinion of your petitioner no plan of rehabilitation or offer of reinsurance has been presented which affords to the policyholders of the old company the measure and the opportunity of protection provided by that contained in the proposed Rehabilitation and Reinsurance Agreement * * * under which your petitioner proposes to rehabilitate the old company * * * Your petitioner accordingly submits said proposed agreement, and asks approval thereof". Petitioner asks for an order directing all interested to show cause why the proposed agreement should not be approved,

and why all the prior acts of the commissioner should not be ratified, confirmed and approved. On the day this petition was filed, the court, per Willis, judge, issued its order to show cause, returnable October 19, 1936. The order prescribed in detail the nature of the notice of the hearing required to be given. Pursuant thereto, notice, in a form prescribed by the court, was posted in three designated public places in Los Angeles; published on ten consecutive days in certain prescribed newspapers in Los Angeles, San Francisco, and Sacramento; mailed to the insurance commissioner of every state in which the old company did business; and mailed to every policyholder and stockholder of the old company.

On October 8, 1936, Judge Willis issued an order amending, nunc pro tunc, the orders of July 22d and August 11th, appointing the conservator. The amended order stated more fully the facts before the court at the time the original orders were made.

The hearing on the order to show cause of September 25th, started October 19th and proceeded continuously to December 4, 1936. At that hearing many persons representing various interests were represented. During the hearing, and prior thereto, various persons and groups proposed plans of rehabilitation different from that proposed by the commissioner. One such plan was proposed by L. M. Giannini, who suggested the liquidation of the old company through a sale of the assets and business to him. This plan was endorsed by the insurance commissioner of the state of Washington, by two large groups of policyholders, and by various individual policyholders. Appellant Neblett suggested a plan, as did intervener Hess, and others. At the hearing full opportunity was given to all who appeared to submit evidence and argue their contentions. On December 4, 1936, Judge Willis made an order approving the plan of rehabilitation proposed by the commissioner. The order recites that this plan makes adequate provision for each class of policyholders, the creditors, and stockholders of the old company; that this plan is fair and equitable; that the plan does not discriminate unfairly or illegally in favor of any class of policyholders; that the intangible assets of the old company were worth "several million dollars"; that the approved plan is designed to preserve and conserve these intangible assets; and that if the old company were dis-

solved and its assets sold such assets would be of substantially less value than if sold as a part of a going concern. The court not only approved the commissioner's plan, but [fol. 1519] also ratified, confirmed and approved all prior steps taken by him. It is from this order of December 4th that these appeals are presented. In the court below several hundred policyholders appeared in person or by counsel. Of this large number, only four have appealed. In L. A. No. 16182, the three appellants are Neblett, Bettin, and Dickinson, while in L. A. No. 16222, on the same record, the appellant is MacDonald. Appellant Neblett is the owner of a life policy in the old company, the other three appellants being owners of non-can policies in that company.

The plan approved by the trial court on December 4, 1936, is an extremely detailed plan, only the essential features of which need be referred to in this opinion. Some of its features have already been mentioned. The new company had already been organized by the commissioner as his corporate agent with a capital of $3,000,000 provided from the assets of the old company, all the new company's stock being held by the commissioner as conservator of the old company. As already mentioned the approved plan provided for the transfer to the new company of all of the assets of the old company with the exception of the new company's stock and certain described claims. The new company agrees to assume without change all of the obligations of the old company under all existing policies, except non-can policies. As to these last-named policies, the new company agrees to assume all obligations thereunder at old premium rates on a reduced benefit schedule, and agrees to restore further benefits and possibly full benefits to such policyholders from certain designated sources of income of the new company. The proposal contemplates that in due course the commissioner will be appointed liquidator of the old company, and in that capacity will receive, liquidate, and pay all claims against the old company from the old company's assets not transferred to the new company (including the new company's stock), and from certain moneys furnished to the liquidator by the new company as provided in the agreement. The plan does not require that old company policyholders are compelled to accept the offer of the new company to assume the old company's policies. Each policyholder is given a reasonable time to elect whether to accept

or reject the offer. A dissenting policyholder is required to file a claim for damages with the liquidator of the old company and the new company agrees to pay such allowed claims in the manner and to the extent as provided in the agreement. The plan also provides that the commissioner, either as conservator or liquidator, shall continue to hold all the stock of the new company as a protection to all old company policyholders. Ultimate mutualization, in the event the policyholders so elect is also provided for. The trial court reserves jurisdiction over the entire proceeding. That, in substance is the plan approved by the lower court.

Before considering the contentions of the parties in reference to the legality of the approved plan, it is first necessary to pass upon certain preliminary contentions.

[3] Respondents point out that the appeals are all from the order of December 4th and contend that the proper appeal record consists only of those pleadings and orders filed on and since September 25th, the date of the filing of the petition ultimately resulting in the order appealed from. It is apparently the contention of respondents that the filing [fol. 1520] of the September 25th petition constituted the institution of a new proceeding separate and apart from any steps theretofore taken, and that if appellants desired prior orders reviewed, separate appeals should have been taken therefrom. With these contentions, we do not agree. It is true that on these appeals we are solely concerned with the validity of the order of December 4th. But it is also true that when the commissioner files a petition to be appointed conservator and asks authority to work out a rehabilitation plan, he has instituted a proceeding which is but one proceeding until the proposed plan is ultimately passed upon. The intervening orders are merely preliminary orders. Any other construction of the provisions of the Insurance Code would result in interminable delays in any proceeding thereunder, and would defeat the obvious purpose of the legislature in adopting the provisions of that code here involved. We agree with appellants that the judgment roll, and therefore the proper appeal record, starts with the petitions and orders of July 22, 1936.

[4] We also agree with appellants that all of the orders made by Judge Edmonds, including the order appointing Carpenter conservator on July 22, 1936, were void by rea-

son of his disqualification. It is well settled that the ownership of a life insurance policy, when such ownership gives the judge an interest in the funds of the insurance company, disqualifies such judge from participating in or deciding any cause or proceeding to which the insurance company is a party. (New York Life Ins. Co. v. Sides, [Tex.] 101 S. W. 1163; Sovereign Camp, Woodmen of the World v. Alford, [Ala.] 89 Sou. 528; Sovereign Camp, Woodmen of the World v. Hale, 120 S. W. 539). The rule of these cases applies with particular force to the instant case. Here the petitions filed on July 22d, disclosed on their face that the commissioner was seeking a special form of liquidation of the insurance company, and that in such proceeding there was involved a conflict of interest between life policyholders and non-can policyholders. We can see no material legal difference between ownership of a policy entitling the recipient to dividends, and ownership of stock in a corporation. Ownership of stock, according to the overwhelming weight of authority, disqualifies the judge. (48 A. L. R. 617). We are not without authority in this state. (Adams v. Minor, 121 Cal. 372; Hall v. Superior Court, 198 Cal. 373; City of Vallejo v. Superior Court, 199 Cal. 408). All three of these cases were decided before subdivision two of section 170 was added to the Code of Civil Procedure expressly making stock ownership a ground of disqualification, and were decided under the general "interest" provisions of that section. It therefore follows that by reason of his ownership of the life policy in the old company, all orders made by Judge Edmonds were void. [5] This holding, however, contrary to the contention of appellants, in no way affects the validity of any of the subsequent proceedings. The validity of the subsequent proceedings is not dependent on the validity of any order made by Judge Edmonds. The subsequent proceedings before Judge Willis stand by themselves independently of the prior orders. In fact, the holding that all of the orders made by Judge Edmonds were void, does not even constitute a holding that the taking possession of the assets of the old company by Carpenter on July 22d without a prior valid court order, was unlawful. Not only were all the acts performed by Carpenter, including the taking possession of the assets of the old company, [fol. 1521] and the organization of the new company, after a full hearing ratified, confirmed and approved by the valid

orders of August 11th and of December 4th, but also the Insurance Code confers the right on the commissioner to take possession of the assets of an insolvent insurance company without a prior court order. Section 1013 of that code confers on the commissioner, whenever it shall appear to him that any insurance company is in such condition that its further transaction of business will be hazardous to its policyholders or creditors, the power to take summary possession "without notice, and before applying to the court for any order." Similar provisions for summary seizure exist in the Bank Act and Building and Loan Act. These sections have uniformly been sustained against the claim of illegal seizure. (State Savings etc. Bank v. Anderson, 165 Cal. 437; North American Building etc. Ass'n v. Richardson, 6 Cal. [2d] 90). The petition for appointment as conservator, containing proper allegations, was filed July 22d. On that date, Carpenter took possession of the assets of the company. This he could lawfully do without court order. He thereupon organized a new company with a name similar to that of the old company as a corporate agent to assist him in carrying on the business of the old company. This is alleged in the petition of September 25th, and we must assume that such allegation was supported by evidence. That Carpenter acted advisedly in forming the new corporation is amply demonstrated, when the nature of the problem facing him is considered. He was in possession of the assets and business of a company that was doing business not only in California, but also in many other states. These assets totalled over $200,000,000. The company was technically insolvent as that term is defined in the Insurance Code, but by no means bankrupt. The old company possessed an agency organization, good will, and a going concern value which the court holds was worth several millions of dollars. The moment Carpenter took possession of the company its right to do business in this and other states ceased. Obviously if this cessation of business continued for any appreciable period the intangible assets already mentioned would have been irreparably lost to the injury of all concerned. It was obvious to him that these assets could be salvaged if the business of the old company could be continued during the rehabilitation period. Faced with this emergency, he formed the new company and purchased all of its stock with assets of the old company, to carry on

such business during that period. He did this after first filing a petition setting forth in full the reasons for his proposed action. It is true that he also secured an order of court approving such proposed action, and it is also true that such approval was unavailing, the order being void. But as soon as the fact that the order was void was discovered, on August 11th, he secured a new order appointing him conservator, and approving everything he had done in connection with the formation of the new company. We must assume that the court below thoroughly investigated this phase of the situation, and found the acts were reasonably necessary. We find no irregularity or illegality in this phase of the transaction.

Turning now, directly, to a consideration of the validity of the order of December 4th, it is appellants' main contention that such order must be reversed for the reason that the judgment roll discloses that it was not preceded by findings of fact and conclusions of law. It is the theory of ap- [fol. 1522] pellants that the proceeding here involved is an ordinary civil action and therefore governed by the provisions of sections 632 and 633 of the Code of Civil Procedure. Predicated on this basic premise, appellants rely on the rule that the requirement of findings in these sections is mandatory, and that failure to make them constitutes prejudicial and reversible error. This is undoubtedly the law, if such findings are necessary and have not been waived. (Estate of Pendell, 216 Cal. 384; Williams v. Wren, 88 Cal. App. 607; Frascona v. Los Angeles Ry. Corp., 48 Cal. App. 135.)

[6] Assuming that findings were required in the present proceedings, a point later to be discussed, and assuming without deciding that the many recitals in the order are not sufficient to constitute findings (but see Petition of Los Angeles Trust Company, 158 Cal. 603), we are nevertheless of the opinion that appellants have not presented a proper case where the rule above discussed is applicable. These appeals have been taken on the judgment roll. The properly authenticated record does not disclose that findings were not waived. From an early date it has been held in this state that on a judgment roll appeal the mere nonappearance of findings where required by statute does not necessarily establish error. The statutes requiring findings recognize that this requirement may be waived. (See sec. 634, Code Civ. Proc.). Error is never presumed, but must be affirma-

tively shown. Where findings do not appear, and are required on a judgment roll appeal it will be conclusively presumed, in the absence of a proper record showing the contrary, in support of the judgment, that such requirement was waived. (Mulcahy v. Glazier, 51 Cal. 626; Cushing-Wetmore Co. v. Gray, 152 Cal. 118.)

[7] Appellants, while recognizing the existence of this rule, contend that the record discloses that findings were demanded and refused, and exceptions noted. To support this contention they refer to a purported colloquy between certain counsel appearing below and the trial judge following the oral opinion of the trial judge. The purported oral opinion and conversation are printed at the end of the last volume of the transcript. An examination of the transcript discloses that the comments referred to are not properly made part of the appeal record. The purported comments are not certified, appearing in the transcript after the formal certification by the clerk. This portion of the purported record is not authenticated nor certified in any way. Appellants seek to remedy this defect by the affidavit of the attorney appearing for appellant Neblett in the court below, attached to appellants' reply brief, to the effect that the trial court's opinion and conversation were copied from a certified copy of the court reporter's transcript. Obviously the defect in the record cannot be cured in that fashion. Assuming that the portion of the purported transcript referred to is capable of the interpretation that the trial court refused to make findings, and that appellants did not waive them, this court cannot properly consider that portion of the purported record. It therefore follows that it must be conclusively presumed in support of the judgment, that findings were waived.

[8] Another complete answer to the present contention is that the proceeding here involved is a special proceeding in which findings are not required. Section 22 of the Code of Civil Procedure defines an "action" as "an ordinary proceeding in a court of justice by which one party prose- [fol. 1523] cutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense". Section 23 provides that "every other remedy is a special proceeding". Under these definitions the proceedings here involved are obviously

special proceedings. The commissioner was not prosecuting an action "for the enforcement or protection of a right", or for the "redress or prevention of a wrong", or for the "punishment of a public offense". The proceeding was had under sections 1010 to 1061 of the Insurance Code which specially deal with the rehabilitation and liquidation of insurance companies. Those sections set up a comprehensive statutory scheme to accomplish those results. The proceeding is not one in which another party is prosecuting another party at all. It is simply a proceeding in which the state is invoking its power over a corporate entity permitted by the state to engage in a business vitally affected with the public interest upon condition of continuing compliance with the requirements provided by the State. It is not a controversy between private parties but a proceeding by the state in the interest of the public.

Once it is determined that the proceeding is a special proceeding, it follows that since the provisions of the Insurance Code in question do not require findings, none are required by sections 632 and 633 of the Code of Civil Procedure. Findings are required and necessary only where a statute so provides. (Matter of Danford, 157 Cal. 425.) Sections 632 and 633 of the Code of Civil Procedure are found in part II of that code which deals with "Civil Actions". By virtue of those sections findings are required, unless waived, in all civil actions. But those sections have no application to special proceedings, some of which are covered in part III of the code. As to special proceedings, findings are only required when the statute so requires. As to many special proceedings findings are required either by direct provision, or indirectly, by reason the statutes dealing therewith incorporating that portion of part II of the code that includes sections 632 and 633. Thus, to give but one example, findings are required in probate proceedings by virtue of section 1230 of the Probate Code, formerly sections 1716 and 1717 of the Code of Civil Procedure. However, when the statute dealing with a particular special proceeding is silent as to the requirement of findings, none is required. Thus in a proceeding for change of name findings are not required. (Petition of Los Angeles Trust Co., 158 Cal. 603). One of the leading cases is Matter of Danford, 157 Cal. 425, where it was held that since the sections of the Code of Civil Procedure dealing with the procedure

to be followed in disbarment proceedings did not directly or indirectly provide for findings, none were required. A reading of the provisions of the Insurance Code here involved demonstrates that there is neither a direct requirement of findings nor are sections 632 and 633 of the Code of Civil Procedure incorporated by reference. It therefore follows that in the present special proceeding findings are not required.

As already stated, the proceedings here under review were taken under sections 1010 to 1061 of the Insurance Code, adopted in 1935. While many of the provisions of that code were merely reenactments of existing law, several of the provisions contained therein in reference to the rehabilitation of insolvent insurance companies were new sections in this state, having been copied, substantially, from similar provisions in the New York insurance law. (Cahills Con. Laws of New York, 1931-1935 Supp., chap. 30, p. 320). In the court below many of those attacking the commissioner's [fol. 1524] plan, including several of the appellants, contended that the provisions of the Insurance Code dealing with rehabilitation of insolvent insurance companies were unconstitutional in that they violated the due process, equal protection of the law, and the contract clauses of the federal Constitution. On the oral argument appellant Neblett conceded, for himself at least, that the provisions in the code are valid and constitutional, but contended, as do several of the other appellants, that the plan and procedure approved by the court below are violative of the federal Constitution. The two phases of the problem are interrelated, and will be considered together.

It seems to be the view of several of the appellants that if the Insurance Code permits the reorganizing of an insolvent company by the organizing of a new company, instead of requiring outright liquidation, the sections are invalid. It is also argued that the approved plan is invalid in that it unfairly and unlawfully discriminates between life policyholders and non-can policyholders. These contentions are without merit. [9] It is no longer open to question that the business of insurance is affected with a public interest. The state has an important and vital interest in the liquidation or reoganization of such a business. (Mitchell v. Taylor, 3 Cal. [2d] 217; German Alliance Ins. Co. v. Kansas, 233 U. S. 389). Neither the company nor a policyholder has the

inviolate rights that characterize private contracts. The contract of the policyholder is subject to the reasonable exercise of the state's police power. The only restriction on the exercise of this power is that the state's action shall be reasonably related to the public interest and shall not be arbitrary or improperly discriminatory. Section 1010 et seq. of the Insurance Code deal with rehabilitation and liquidation of insurance companies in financial difficulties, and with the reinsurance of their business. This phase of state control is extremely important. Insurance is a public asset, a basis of credit, and a vital factor in business activity. Obviously, if an insurance company gets into financial difficulties, something must be done to remedy the situation. Either the company must be liquidated, and its assets distributed to its creditors, thus immeasurably injuring many of its policyholders who are thus deprived of insurance protection, or the business must, if possible, be rehabilitated. The public has a grave and important interest in preserving the business if that is possible. Liquidation is the last resort. (National Surety Corporation v. Nantz, [Ky.] 90 S. W. [2d] 385; In re Globe and Rutgers Fire Ins. Co., 266 N. Y. S. 29; In re Bond and Mortgage Guarantee Co., 283 N. Y. S. 623). The provisions of the California Insurance Code recognize the public interest involved and provide for rehabilitation of such companies, if possible. Section 1011 provides for the filing by the commissioner of a petition for appointment as conservator whenever, among other things, it is disclosed after examination that the company is in such a condition that its further transaction of business would be hazardous to its policyholders, or creditors, or to the public; that when the commissioner files a verified petition, as was done here, together with a copy of the last report of examination showing the company is insolvent, the trial court shall issue its order vesting the commissioner with title to all the assets of the company and directing the commissioner as such conservator to conduct the business. Section 1012 provides that the order above mentioned shall remain in force until it shall appear to the court that the company can properly resume the conduct of its business. Section 1013, already discussed, gives the commissioner power of summary seiz- [fol. 1525] ure without notice or prior court order. Section 1015 requires the commissioner immediately after a summary seizure to institute proceedings under section 1011.

Section 1016 provides that if after his appointment as conservator, it shall appear to the commissioner that further efforts to proceed under section 1011 "would be futile" he may apply for an order to liquidate the company. Section 1020 confers on the court power to issue certain restraining orders in connection with granting orders under sections 1011 or 1016. The sections immediately following provide for the procedure to be followed in handling and disposing of claims in the liquidation proceedings. Section 1035 confers on the commissioner power to employ special deputy commissioners, clerks and assistants "and to give to each of them such power as may by him be deemed necessary". Section 1037 defines the wide powers conferred on the commissioner as conservator or liquidator. Section 1043 confers on the commissioner, either "as conservator or as liquidator", subject to the approval of the court the power to "mutualize or reinsure the business", of the company or to "enter into rehabilitation agreements". Section 1057 makes the commissioner in all proceedings under the provisions of the code, the trustee for the benefit of all creditors and other interested parties.

[10] Under the statutory plan thus embodied in the Insurance Code, the state, acting under and within its police power, has provided that the commissioner, when an insurance company is in financial difficulties, shall first be appointed by the court as conservator. As such, it is his duty to operate the company and to try to remove the causes leading to its difficulties. If this cannot be done, then he must attempt to rehabilitate the business of the company as conservator or liquidator, by entering into, with court approval, either reinsuring or rehabilitation agreements. Only if this cannot be done and further efforts "would be futile" should liquidation be resorted to.

[11] In the present case the merits of the legislative policy of rehabilitation if possible instead of liquidation is well illustrated. The old company has been doing business in California since 1868. At the time the commissioner petitioned to be appointed conservator the old company was doing business in 43 states and in the District of Columbia. As of December 31, 1935, it had life insurance in force of over $600,000,000. It had about 300,000 policyholders. Its assets were in excess of $200,000,000. Its life insurance busi-

ness was on a sound basis and very profitable. Its difficulties were caused almost entirely by reason of inadequate reserves behind its non-can policies, which was caused by inadequate premium rates based on actuarial under-calculations. The convention examination disclosed that the old company was fundamentally sound, and that all its reserves were unimpaired, except those pertaining to the non-can policies, as to which there was a deficiency of approximately $23,000,000. The company had intangible assets consisting of good will, going concern value, and an extensive agency organization worth several millions of dollars. All these intangible assets would be lost if the old company were liquidated. The old company was powerless to change the existing non-can policies. The contract and due process clauses prohibited the company from making any changes therein. But these prohibitions do not apply to the state acting under its police powers. Obviously, if the agency organization were to be preserved pending court approval of a rehabilitation plan, the business of the old company had to be continued. Faced with these facts the commissioner determined [fol. 1526] to organize a new company to continue the business pending the approval of a rehabilitation plan. All these steps, after a full hearing, were later approved by the court. Under the rehabilitation agreement, approved by the trial court, the new company takes over substantially all of the assets of the old company, with the exception of the new company's stock, assumes as to consenting policyholders all policies of the old company, reduced as to non-can policyholders as provided in the agreement, and assumes as therein provided, the liabilities of the old company.

This method of rehabilitation by the formation of a new company is obviously contemplated by the Insurance Code. A similar plan for the rehabilitation of National Surety Company has been sustained by various courts in a similar proceeding under the New York law upon which the California law is modeled. The superintendent of insurance of New York found the National Surety Company, a New York corporation, to be insolvent. That company, like the old company here, was engaged in a nation-wide business of great magnitude, and the company had a good will of great value. As statutory rehabilitator he proposed a plan, approved by the court, to conserve the assets by organizing a new company—the National Surety Corporation—with a capital of

$1,000,000 and a surplus of $3,000,000 paid in from the assets of the old company in exchange for all of the stock of the new company, which was to be held by the commissioner for the protection of all concerned. The new company was to assume a portion of the liabilities of the old, and the new company was to receive all the liquid and most desirable assets of the old. A second corporation was organized to liquidate certain mortgage securities of the old company out of certain assets transferred to it. A third corporation was organized to receive certain frozen assets of the old company, and to pay therefrom certain obligations not assumed by the other two new corporations. The plan was attacked on the ground it was beyond the power of the commissioner and was unconstitutionally discriminatory. Among other things it was held that the legislature had the power to permit rehabilitation instead of liquidation and that in working out a plan of rehabilitation a new corporation could be formed to receive the assets of the old in order to save the profitable business and good will of the old company. The New York court upheld the plan against several objections here made by appellants. (Application of People by Van Schaick, 268 N. Y. S. 88.) The New York court of appeals in People by Van Schaick v. National Surety Co., 191 N. E. 521, affirmed the supreme court, appellate division, on the authority of Matter of People (Title and Mortgage Guarantee Co. of Buffalo), 190 N. E. 153. In this last-entitled case many of the provisions of the Insurance Code of New York dealing with rehabilitation were upheld.

The National Surety Company rehabilitation plan was later subjected to attack in Kentucky. The courts of that state likewise upheld the rehabilitation, emphasizing the importance to all concerned of preserving the good will of the old company and of rehabilitation in place of liquidation. The Kentucky court upheld the plan against the contention of a creditor of the old company who claimed discrimination in that his debt was not assumed in full. (National Surety Corporation v. Nantz, [Ky.] 90 S. W. [2d] 385.)

The legality of the plan was likewise attacked in the federal courts of South Carolina. In that action it was contended, as appellant Neblett contends here, that the plan of [fol. 1527] rehabilitation amounted to a fraudulent transaction whereby the new corporation took the valuable assets of the old corporation, the latter company by this maneuver

seeking to evade its liabilities. It was contended that equity should annul the fraud. The court held that the transfer to the new company of the desirable assets of the old was in the ultimate interests of all creditors, and that thereby valuable intangible assets were saved that by liquidation would have been lost. The plan was again upheld and approved. (Thrower v. Kistler, 14 Fed. Supp. 217.)

In several other cases the courts have approved plans for rehabilitation of companies in which a new company was organized to carry on the business of the old. (In re Bond and Mortgage Guarantee Co., 283 N. Y. S. 623; In re New York Title and Mortgage Co., 281 N. Y. S. 715; In re Rehabilitation of Lawyers Mortgage Co., 287 N. Y. S. 625; Gauss v. Central West Casualty Co., [Mich.] 253 N. W. 252.)

In the face of these many well reasoned cases, appellants contend that the Insurance Code does not permit the rehabilitation of an insolvent company by the organization of a new company. Specifically it is contended that the code merely permits rehabilitation agreements and the reinsuring of an insolvent company's business. It is urged that the plan as approved, calling as it does for a transfer of assets to a new company, is neither a rehabilitation agreement, nor a reinsurance of the old company's business. The plan as approved is called by appellants a "reorganization" of the old company, and it is urged that a reorganization is not included within the meaning of rehabilitation; that the term, "rehabilitation" necessarily implies the continuance of the old company as a going concern. The New York cases are attempted to be distinguished on the ground that section 52 of the New York law expressly permits reorganization of insurance companies, and that no similar provision exists in California. These points are without merit. An examination of the New York cases definitely discloses that they were decided under the rehabilitation sections of the New York law, and not under section 52. It is to be noted that under section 1043 of the California Insurance Code the legislature was careful to provide for the rehabilitation and reinsuring of the "business" of an insolvent company. The legislature provided for the rehabilitation of the business of the old company—not of the company itself. The code when read as a whole discloses a clear and unequivocal intent to preserve whenever possible the "business" of the insolvent company, and if to preserve such business—if to rehabilitate

such business—a new corporation must be organized, the power clearly exists.

[12] Equally untenable is the argument that the plan as approved does not call for the "reinsurance" of the business of the old company. Appellants contend that the term "reinsurance" has but one meaning—one company reinsuring the risks of another company, the latter company still remaining liable on the original risk. Reference is made to section 620 of the Insurance Code containing such a definition. But the term has likewise another well recognized meaning—that is, a contract by which one company (the new company here) takes over the insurance risks of another company (the old company here) and becomes substituted as insurer in the place and stead of the original insurer. (33 Cor. Jur. 58, sec. 736; People v. American Cent. Ins. Co., [Mich.] 146 N. W. 235.) Inasmuch as section 1043 of the Insurance Code confers the right of reinsuring in event of liquidation, obviously the term as used in that [fol. 1528] section was not intended to be limited solely to its indemnification meaning, but also includes the broader meaning above discussed.

[13] Appellants attack the plan as being unlawfully discriminatory, in that life policyholders are taken into the plan on more liberal terms than non-can policyholders. In the first place it is to be noted that every policyholder is given his election to accept or reject the plan. Every policyholder who consents to the plan clearly enters into a novation with the new company. Having done so, such consenter cannot complain that he has been unfairly treated. (Mulcahy v. Baldwin, 216 Cal. 517.) As to the dissenter to the plan, it is clear that he has no legal cause for complaint simply because the commissioner determined to rehabilitate rather than liquidate. The United States Supreme Court has unequivocally determined that a creditor or policyholder has no vested right in liquidation in event of insolvency. There is no property right, in the constitutional sense, in any form of remedy. (Doty v. Love, 295 U. S. 64; Gibbes v. Zimmerman, 290 U. S. 326; see, also, Daniel v. Layton, 75 Fed. [2d] 135.) All that the law requires as to a dissenter is that he receive the liquidated value of his contract rights without unreasonable delay—he has no vested right to immediate payment. In Doty v. Love, supra, page 71, the United States Supreme Court in reference to a bank reorganization stated:

"The argument is made that some of the assets of the old bank are placed at the risk of the business of the new one. The finding is that collections are made more promptly by a going concern than by one in liquidation . . . Adequate precautions are embodied in the plan to assure the enjoyment of these benefits by the creditors and not by others. It is one of the terms of the decree that none of the profits of the business may be used for the new shareholders until every dollar's worth of assets turned over by the Superintendent has been paid to the creditors or delivered to the pool."

All the dissenter is entitled to is the equivalent of what he would receive on liquidation. Appellant Bettin urges that his remedy against the old company is ineffective because that company has conveyed all its assets of value to the new company. The record shows the contrary. It discloses that as trustee for all creditors of the old company, including dissenters, the commissioner holds all of the stock of the new company, the agreement of the new company to pay him certain sums equivalent to the reserves established on policies whose owners dissent, and the agreement of the new company to pay over to him for the benefit of all creditors of the old company portions of its future earnings. There is nothing in the judgment roll to indicate the value of these assets. The record is also silent as to what the policyholders would have received in liquidation. All that the judgment roll discloses is that under the approved plan the assets are far in excess of what they would be on liquidation. On these appeals, without the evidence before us, in support of the judgment, we must assume that evidence was introduced on these vital points, and that such evidence demonstrated that dissenters under the plan will receive as much, or more, as they would have received on liquidation. The order appealed from contains a recital that adequate provi-
[fol. 1529] sion is made in the plan for each class of policyholder. We must assume that such recital was amply supported by evidence.

It is true that the approved plan treats consenting life policyholders differently from consenting non-can policyholders, but if they dissent they are treated the same—they are allowed and will be paid the amount allowed by law as the measure of damages from the assets of the old company above enumerated.

Moreover, the record demonstrates that under the circumstances here existing the difference in treatment was justified. The life policyholders, and the commercial health and accident policyholders were paying adequate premiums for their insurance and these phases of the old company's business were highly profitable. The non-can policyholders were not paying adequate premiums, and this fact was the primary cause of the difficulties of the old company. The non-can policies were draining the old company to disaster. If any plan of rehabilitation was to succeed it was imperative that the integrity of the life business be preserved in order to earn profits for the benefit of all concerned, including the non-can policyholders. Continued profits from the life business, and from the profitable accident and health business, furnished the only sources from which full contract benefits to non-can policyholders could ever be resumed. Under the plan 10 per cent of the net earnings of participating life policies, nearly all the net earnings of the nonparticipating life policies, and nearly all the net earnings of the commercial accident and health policies are made available for the ultimate restoration of full benefits to non-can consenters, and for full payment of all claims of non-can dissenters. It is quite clear that since the old company was insolvent, the new company could not assume all the liabilities of the old company or it too would be insolvent. Appellants urge, however, that the reduction in assumption should have been equalized. None of the evidence produced over a six weeks' period is before us. The evidence might well have shown, and the conclusion seems to us quite a logical one, that if life policies were reduced so as to be equalized with the non-can policies, such reduction would dangerously impair the possibility of writing new life insurance which would ultimately disorganize and destroy the agency organization. The evidence might well have shown (and probably did) that such reduction in life policies would cause lapses and surrenders in such policies, particularly of those still insurable in other companies, leaving only undesirable risks accepting the reduction. If the evidence showed these facts it might well be that the evidence also showed that equalization would produce less for the non-can policyholders than the plan adopted. In other words, the difference in treatment can be justified on the theory that such difference was necessary not only to preserve life policyholders' rights, but also the rights of

non-can policyholders. Other grounds for the difference in treatment readily occur to us. Under such circumstances we must assume that the holding of the trial court that the plan does not unfairly discriminate was supported by the evidence.

[14] Appellants Neblett and MacDonald next argue that the approved agreement permits a fraudulent conveyance in violation of sections 3439 and 3442 of the Civil Code. Under the first section "every transfer of property . . . and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor . . ." Section 3442 [fol. 1530] provides that generally "the question of fraudulent intent is one of fact and not of law; . . . provided, however, that any transfer or incumbrance of property, made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors." The sections, obviously, have no application to the proceedings here involved. We are not here presented with a case where an insolvent individual or corporation by private contract conveys away his or its assets with intent to defraud creditors. Here the transfer was made pursuant to a valid statute after court approval. Clearly there can exist no intent to defraud when the transfer is made under the terms of a valid statute and pursuant to a court order. The old company did not convey its assets to the new company while insolvent. The commissioner, as already held, validly took possession of the assets of the old company on July 22, 1936. On August 11, 1936, he was validly appointed conservator, his prior acts approved, and his title to the assets expressly confirmed. By operation of law, pursuant to the express terms of the statute, title to all of the assets of the old company became legally vested in the commissioner as trustee for all creditors. The transfer of these assets from the commissioner to the new company occurred pursuant to statutory authority and order of court.

These two appellants strongly rely on Shapiro v. Wilgus, 287 U. S. 348. The case merely serves to emphasize the distinction here involved. In that case there was involved a conveyance of his assets by a harassed individual to a corporation for the purpose of obstructing his creditors.

It was conceded that the conveyance was made to hinder and delay his creditors. In the present case the conveyance was made after a full court hearing, by court approval and order, pursuant to the terms of a valid statute. The conveyance to the new company was not made by the insolvent debtor, but by the commissioner, a state official, and was made, as held by the court, for the purpose of preserving and protecting the rights of creditors. All of the cases cited by appellants relate to private transactions, and are not in point.

(15) Appellant MacDonald contends that the conveyance to the new company was void because Carpenter was not validly appointed liquidator before making the conveyance. It will be remembered that Judge Willis appointed Carpenter conservator on August 11th, but did not appoint him liquidator. The argument of appellant MacDonald is predicated on the contention that to rehabilitate a company the commissioner must first be appointed liquidator under section 1016 of the Insurance Code. That section has nothing to do with the power to rehabilitate. That is expressly covered by section 1043 providing that "the commissioner, as conservator or liquidator", may, with court approval, enter into rehabilitation agreements.

(16) Appellants next urge that the order of December 4th is void because the commissioner did not secure a valid permit for the issuance of the stock of the new company. It is contended that under sections 820-860 of the Insurance Code an insurance company must secure from the commissioner a permit to issue stock. It is stated that the commissioner at no time secured a permit from himself as commissioner to himself as conservator, but that the only permit secured was from himself to himself as liquidator. To support this contention one of the appellants attaches to his brief what purports to be a permit from himself as commissioner to himself as liquidator, authorizing the new [fol. 1531] company issue, and states, without reference to the record, that this was the only permit issued or secured. To state the contention is to answer it. The law does not require idle acts. We doubt whether the provisions of the Insurance Code requiring the securing of a permit from the commissioner for the issuance of stock apply to the commissioner himself, where court approval of the issuance

is contemplated and secured. In the second place the record does not support appellants' contention. The record does not disclose that the permit set forth in the brief was actually issued, nor that that permit was the only one secured. If appellants desired to raise this point it was their duty to present a proper record to this court. They have elected to appeal on the judgment roll. All intendments are in support of the order appealed from. If a permit from the commissioner to himself as conservator was required, in support of the order, we must conclusively presume that such permit was secured.

[17] Appellants MacDonald and Neblett urge that section 1043 of the Insurance Code, and the plan as approved, are violative of section 13 of Art. XII of the state Constitution which provides: "The state shall not, in any manner, loan its credit, nor shall it subscribe to or be interested in the stock of any company, association, or corporation." Relying on Mitchell v. Taylor, 3 Cal. (2d) 217, where it was held that the insurance commissioner in taking charge of insolvent companies is a state officer acting on behalf of the state, it is contended that since the commissioner as conservator has subscribed to all of the stock of the new company, the state has so subscribed and the Constitution violated. Of course the insurance commissioner is a state officer, and of course the state has an interest in rehabilitating insolvent insurance companies, but that interest is not a vested interest as is contemplated by the above constitutional provision. Section 1057 of the Insurance Code, above referred to, expressly provides that in all proceedings thereunder the commissioner acts as trustee for the benefit of all of the creditors of the insolvent company. It is quite clear that the commissioner by subscribing to the stock of the new company has not loaned the credit of the state to the new company. Not a penny of state money has gone into the treasury of the new company. No liability under the agreement is imposed on the conservator either in his official or personal capacity. There was no loan of credit at all. The commissioner acting pursuant to a statute, with court approval, took certain assets of the old company and transferred them to the new company in exchange for the stock which he holds as trustee for the benefit of the creditors of the old company. Obviously, the commissioner as a state officer did not subscribe to the stock of the new

company so as to make the state a stockholder. The point is without merit.

[18] Equally untenable is appellant Neblett's contention that the use of the word, "mutual" in the name of the new company is misleading, illegal and fraudulent, in that the company is not a "mutual" company. It is to be noted that the challenged term has been in the old company's name since its incorporation in 1868. The new name was obviously chosen by the commissioner so as to conserve, so far as possible, the value of the old name. The record does disclose that the old company and the new company are stock companies, but it is also disclosed that the new company (as was the old company) is authorized to issue participating life policies as well as nonparticipating policies. The record also shows that the approved plan pro- [fol. 1532] vides for the ultimate mutualization of the company on certain designated conditions. Whether these facts justify the use of the term, "mutual" in the new company's name was a question for the consideration of the trial court.

[19] Some reference is made in the briefs and in the judgment roll to other plans of rehabilitation submitted to the trial court. The evidence as to the relative merits of the various plans is not before us. The record shows that the commissioner and the trial court studied and gave consideration to all proposed plans and found the one here approved to be the one best fitted to protect and preserve the rights of all concerned. Obviously, this court, without any evidence before it, cannot now determine the relative merits of any of the submitted plans.

We have considered all of appellants' contentions. From a careful examination of the record before us, we are satisfied that the order of the trial court appealed from should be affirmed.

The motion to strike appellant Neblett's opening brief from the files is denied; the order appealed from is affirmed.

Chief Justice Waste and Justice Edmonds being disqualified did not participate in the decision.

[fol. 1533] SUPREME COURT, STATE OF CALIFORNIA

Tuesday, September 14, 1937.

L. A. 16182

CARPENTER

vs.

PACIFIC MUTUAL LIFE INS. Co.

By the COURT:

Cause and motion to strike opening brief submitted.

Waste, C. J.

Dated: September 14, 1937.

Thursday, January 6, 1938.

L. A. 16182

CARPENTER

vs.

PACIFIC MUTUAL LIFE INS. Co.

By the COURT:

The petition for a rehearing is denied.

Seawell, Acting C. J.

Dated: January 6, 1938.

Seawell, J. voted for a rehearing. Waste, C. J. and Edmonds J. did not participate in the discussion or the decision on the petition for rehearing.

[fol. 1534] I, B. Grant Taylor, Clerk of the Supreme Court, State of California, do hereby certify that the preceding and annexed is a true and correct copy of Minute order of September 14th, 1937 submitting cause and motion, minute order of January 6, 1938 denying petition for rehearing and opinion of December 7, 1937 in case L. A. 16182—Carpenter vs. Pacific Mutual Life Insurance Co., as shown by the records of my office.

Witness my hand and the seal of the Court, this 9th day of February, A. D. 1938.

B. Grant Taylor, Clerk; by E. L. Blake, Deputy.

(Seal Supreme Court of California.)

[fol. 1535] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 21

ORDER ALLOWING CERTIORARI—Filed May 16, 1938

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Reed took no part in the consideration or decision of this application.

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SUPREME COURT
OF THE
UNITED STATES.

October Term, 1937
No. [redacted] 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON, and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

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SUBJECT INDEX.

PAGE

Petition for writ of certiorari 3

A.

Summary statement of the matter involved 4

B.

Reasons relied on for allowance of the writ 12

Prayer for writ 22

Brief in support of petition for writ of certiorari 25

I.

The opinions of the courts below 25

II.

Jurisdiction 26

III.

Statement of the case 27

IV.

Specification of errors 28

V.

Argument 29

Summary of the argument 29

The Supreme Court of California denied the petitioners and all other policyholders of the Pacific Mutual Life Insurance Company of California due process of law, under the Fourteenth Amendment to the Federal Constitution, when it held that the California courts acquired jurisdiction of the Pacific Mutual Life Insurance Company of California and its policyholders, on a petition which did not state facts required by the Insurance Code of California to give the courts jurisdiction, and when it held that title to the assets belonging to the insurance company and to its policyholders could be vested in the Insurance Commissioner and by him transferred to a reorganized company on authority of court orders which were absolutely void 29

PAGE

Point A 29

Point B 30

Point C 30

Point D 30

Point E 31

Point F 31

Point G 31

Point H 31

Point I 32

The contracts of the petitioners and all other policyholders have been impaired in violation of Article 1, Section 10, of the Federal Constitution. The contracts of the life policyholders have been violated by compelling them to accept the new company as the insurer in place of the old. The contracts of the non-cancellable accident and health policyholders have been impaired by compelling them to take a reduction of benefits. The contracts of both the life and non-cancellable policyholders have been impaired by destroying their rights to any benefits under the reorganization unless they assent to it 32

Point J 32

Point A. The California courts never acquired jurisdiction of the Pacific Mutual Life Insurance Company of California..... 33

Point B. All of the orders made by the court affecting title to the assets of the insurance company and approving their transfer to the reorganized company were void because of the disqualification of the judge who made the orders..... 36

Point C. The Supreme Court of California erroneously held that the void orders of Judge Edmonds could be approved, and that the reorganization under these void orders could be validated by subsequent approval..... 39

PAGE

Point D. Judge Edmonds' orders were all illegal and void because he was prohibited by the California Statute from sitting or acting in the case 41

Point E. The subsequent orders of a qualified judge confirming the void orders still deny due process 43

Point F. The Commissioner had no authority to make nor the California Courts jurisdiction to approve, a delegation of his duties as conservator or liquidator to a corporation 46

Point G. The power to reorganize cannot be implied from the right of the Commissioner as Conservator to enter into rehabilitation agreements 48

Point H. The provision in the Insurance Code of California that the Commissioner as Conservator "may enter into rehabilitation agreements" is so vague and uncertain as to be unconstitutional 49

Point I. The joinder of the old company with the Commissioner in the conveyance to the new company was fraudulent and void 52

The contracts of the life policyholders have been violated by compelling them to accept the new company as the insurer in place of the old. The contracts of the non-cancellable accident and health policyholders have been impaired by compelling them to take a reduction of benefits. The contracts of both the life and non-cancellable policyholders have been impaired by destroying their rights to any benefits under the reorganization unless they assent to it 54

Point J. The contracts of the petitioners and all other policyholders have been impaired in violation of Article I, Section 10 of the Federal Constitution 55

Conclusion 57

Appendix 59

TABLE OF AUTHORITIES CITED.

CASES.

PAGE

Ball v. Tolman, 135 Cal. 375.....15, 30, 31, 40, 45
Bank of United States v. Owens, 2 Peters 527.....15, 30, 42
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673.....
.....27, 32, 54
Callaghan v. R. F. C., 297 U. S. 464.....20
Citizens National Bank of Cincinnati v. Durr, 257 U. S. 99.....27
Cline v. Frink Dairy Co., 274 U. S. 445.....18, 31, 50
Connally v. General Construction Co., 269 U. S. 385.....18, 31, 50
Coombes v. Getz, 285 U. S. 434.....16, 27
Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.....14
Cumberland Coal Co. v. Board of Revision of Tax Assessments in Green County, Pa., 284 U. S. 23.....27
Daman v. Hunt, 47 Cal. App. 274.....12, 29, 35
Desmare v. United States, 95 U. S. 605.....14, 30, 42
Doty v. Love, 295 U. S. 64.....27, 32, 50
E. Bement & Sons v. Nat. Harrow Co., 186 U. S. 70.....30, 40
East Tenn. V. & G. R. v. So. Tel. Co., 112 U. S. 306.....13, 29, 34
Hall v. Coppell, 7 Wallace 542.....14, 30, 40, 41
Hartford Life Insurance Co. v. Dowds, 261 U. S. 476.....27
Hentschel v. Fidelity & Deposit Co. of Maryland (C. C. A. 8), 87 Fed. (2d) 833.....18, 31, 47
Jones v. Union Oil, 218 Cal. 775.....30, 42
Levezey v. Gorgas, 4 Dall. 71.....18, 31, 47
Levinson v. Boas, 150 Cal. 185.....15
Levy v. Dunn, 160 N. Y. 504, 73 Am. St. Rep. 699.....32, 56
Lindsay-Strathmore I. Dist. v. Superior Court, 182 Cal. 315.....30, 38
Marin M. W. Dist. v. North Coast W. Co., 178 Cal. 324.....30, 38
McAllister v. Story, 7 Cal. 428.....29, 35
McClaughry v. Deming, 186 U. S. 49.....30, 38

PAGE

McDonald v. Katz, 31 Cal. 167 ..... 12, 29, 35

Meguire v. Corwine, 101 U. S. 108 ..... 14, 30, 42

Miller v. McLaughlin, 281 U. S. 261 27

Miller v. Murphy, 186 Cal. 344 ..... 30, 42

Morey v. Paladini, 187 Cal. 727 15

Morse v. United States, 270 U. S. 151 26

Murray v. American Surety Co. of N. Y. (C. C. A. 9), 70 Fed. 341 ..... 12, 29, 33, 34

New York Title & Mtg. Co., In re, 274 N. Y. S. 270 ..... 31, 48

New York Title & Mtg. Co. v. Friedman, 276 N. Y. S. 72 ..... 31, 48

Northern P. R. Co. v. Boyd, 228 U. S. 482 ..... 32, 53

Northern P. R. Co. v. Minnesota, 208 U. S. 583 ..... 16, 32, 55

Oakley v. Aspinwall, 3 N. Y. 547 ..... 30, 38

Ochoa v. Hernandez y Morales, 230 U. S. 139 ..... 32, 54

O'Neill v. Leamer, 239 U. S. 244 27

Pioneer Land Co. v. Maddux, 109 Cal. 633 ..... 15, 30, 31, 40, 45

Postal Telegraph-Cable Co. v. City of Newport, 247 U. S. 464 ..... 32, 54

Pullman Palace Car Co. v. Central Transportation Co., 171 U. S. 138 15

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, v. Pacific Mutual Life Insurance Company of California, et al., 94 Cal. Dec. 681 25

Schechter v. United States, 295 U. S. 495 ..... 18, 31, 47

Small Co. v. American Sugar Refining Co., 267 U. S. 233 ..... 18, 32, 50

Smith v. Westerfield, 88 Cal. 374 ..... 29, 34

Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566, 14 A. L. R. 1054 ..... 18, 31, 50

Title & Mtg. Guarantee Co., In re, 275 N. Y. S. 353 ..... 31, 48

Tumey v. Ohio, 273 U. S. 510 ..... 31, 40

PAGE

Tyler v. Park Ridge Country Club, 103 Cal. App. 117 ..... 15, 30, 31, 40, 45

Union Collection Co. v. Buckman, 150 Cal. 159 15

Union Guarantee & Mortgage Co., In re (C. C. A. 2), 75 Fed. (2d) 984 20

Whitfield v. State of Ohio, 297 U. S. 43 27

STATUTES.

Acts of the Legislature of 1915, Chap. 317, Sec. 2 ..... 31, 46

Acts of the Legislature of 1915, Chap. 417, Sec. 1 46

Bankruptcy Act, Sec. 4, 11 U. S. C. 22 20

Bankruptcy Act, Sec. 77-B 20

California Civil Code, Sec. 305 ..... 30, 37

California Civil Code, Secs. 3439 and 3442 ..... 32, 52, 53

California Code of Civil Procedure, Sec. 170 ..... 30, 42

California Insurance Code, Sec. 1043 ..... 5, 17, 31, 45, 48

Federal Constitution, Art. 1, Sec. 10 ..... 4, 10, 16, 27, 28, 32, 57

Insurance Code of California, Sec. 1011 ..... 6, 12, 26, 29, 30, 31, 33, 35, 39, 40, 45

Insurance Code of California, Secs. 1012, 1013, 1014, 1015, 1016, 1037 and 1043 26

Insurance Code, Sec. 1013 ..... 39, 40

Insurance Code, Sec. 1015 39

Insurance Code, Sec. 1035 46

Insurance Code, Sec. 1037(d) 51

Judicial Code, Sec. 237(b) (U. S. C., Title 28, Sec. 344(b)) 26

New York Insurance Law, Sec. 52 49

INDEX TO APPENDIX.

PAGE

California Civil Code:

Secs. 3439 and 3442 59

Sec. 3439 59

Sec. 3442 59

California Insurance Code of 1935:

Secs. 1011, 1012, 1013, 1014, 1015, 1016, 1025, 1035, 1037, 1043 59

Sec. 1011 59

Sec. 1012 61

Sec. 1013 61

Sec. 1014 62

Sec. 1015 62

Sec. 1016 62

Sec. 1025 63

Sec. 1035 63

Sec. 1037 64

Sec. 1043 64

New York Insurance Code, Sec. 52 65

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1937

No. .....

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON, and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, RUPERT B. TURNBULL, et al., for themselves and for other noncancellable policyholders similarly situated and for FRANCIS ADAMS for himself and for other non-cancellable policyholders similarly situated; GEORGE W. MANIERRE and B. ROBERT GETTS on their own behalf and on behalf of all similarly situated policyholders; MARSHALL D. HALL and JOSEPH C. McMANUS on behalf of themselves and other holders of non-cancellable income policies; NEIL S. McCARTHY on his own behalf, RALPH R. HUESMAN and BROADTOWN INVESTMENT COMPANY, a corporation; DR. ARTHUR B. ALLEN, et al.; DAVID LYNN OPENSHAW, et al.; HENRY B. SENN; HERBERT E. FRESTON; ROBERT J. WEBB and PHILIP M. KLUTZNICK for themselves and all other persons similarly situated; R. RABINOWITZ; ROSCOE R. HESS; G. C. PARSONS, J. A. MARVIN and G. R. SNIDER, et al., on behalf of themselves and all other holders of non-cancellable policies, and as members of a protective committee for holders of non-cancellable income policies; AUSTIN O. MARTIN and REX HARDY; WILLIAM A. SULLIVAN, Insurance Commissioner of the State of Washington; ARTHUR E. WHITE; GEORGE I. COCHRAN, et al.; WILLIAM A. BECKETT, et al.; ARTHUR D. WUNNER; C. N. WESLEY, et al.; WILBUR G. KATZ, et al.; CARL C. KATLEMAN, et al., for himself and all others similarly situated; ANDREW J. COPP, JR.; RALPH C. HAMLIN; ROWE SANDERSON, et al.; ROBERT CASAMAJOR, et al.; BEN S. HUNTER; CLARA M. GARUNAN, et al.; JOHN P. OLIVER; HAROLD S. COOK, et al.; EDWIN JANSS, et al.; E. A. CONWAY, Secretary of State of Louisiana; CARROLL C. DAY, HARRY C. FABLING, JOSEPH M. GANTZ, JACK PASCHALL and RALPH J. WETZEL; J. PARKER EVANS, on behalf of himself and all other holders of active life non-cancellable income policies issued in the State of Alabama who may wish to join with him in the proceeding,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of Wm. H. Neblett, Vernor Bettin, William George Dickinson and Alfred F. MacDonald respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

Petitioners, who are policyholders[1] in an insolvent life, accident and health insurance company, pray that this Court review a decision of the Supreme Court of California, the court of last resort in that state, affirming a series of void orders made by the lower court in a special proceeding, had under the Insurance Code of the state, on application of its Insurance Commissioner, to reorganize the insolvent insurance company.

The Federal questions of lack of due process under the 14th Amendment to the Federal Constitution, of the impairment of the obligation of contract under Article 1, Section 10, of the Federal Constitution, and of the denial of the equal protection of the law, were raised and urged throughout the proceedings in the lower and highest state courts.[2] The lower court's rejection of these Federal questions was considered and affirmed by the upper court.[3]

The insolvency provisions of the Insurance Code of California were adopted in 1935.[4] Less than a year after

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[1]R. 245; R. 626; R. 681; R. 690; R. 1233.

[2]R. 245-251; R. 626-630; R. 681-687; R. 990-995; R. 1233-1236; R. 1274-1276; R. 1509-1544.

[3]R. 1509-1544.

[4]In effect September 15, 1935, Statutes 1935, Chapter 145.

the new Code went into effect, and on July 22, 1936, the Pacific Mutual Life Insurance Company of California was reorganized under the new law by Insurance Commissioner Samuel L. Carpenter, Jr., acting as liquidator under a void court order of appointment, into another company called Pacific Mutual Life Insurance Company. The two companies will be referred to in this petition as the old and new companies. Both are California corporations.

The old company was organized in 1868.[5] It prospered, spreading into forty-three states, so that at the time the Insurance Commissioner declared it to be insolvent[6] it had 300,000 policyholders of all classes holding policies insuring them for approximately $700,000,000, and had admitted assets, of a tangible character, of $215,000,000.[7]

There is no provision in the California Insurance Code for the reorganization of an insolvent insurance company. The reorganization was accomplished here by naming it "rehabilitation," which is mentioned in the Code.[8] The method of reorganization was simple. On July 22, 1936, Samuel L. Carpenter, Jr., Insurance Commissioner of California, filed a petition in the Superior Court of Los Angeles, California,[9] praying that he be appointed con-

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[5]R. 1535.

[6]July 22, 1936.

[7]R. 63-64; R. 1534-1535.

[8]California Insurance Code, Sec. 1043, Appendix p. 64.

[9]The Superior Court is the lower court of general jurisdiction in California.

servator of the old company[10] under the Code.[1] To his application the Commissioner attached the regular tri-annual convention examination made by the insurance commissioners of California and six other states.[2] Their report was dated July 21, 1936, but was made as of December 31, 1935.[3]

Although "mutual" is a part of the name of both companies, indicating that they are non-profit organizations conducted for the benefit of the policyholders, they are ordinary stock corporations. The several classes of policies issued by the old company were participating life, accident and health, and non-cancelable income accident and health.[4] The non-cancelable income accident and health policies are referred to throughout the proceedings as "non-cans."

The report of the convention examiners showed the company to be in excellent condition except in the non-can department. It was determined on July 21, 1936, that the latter department had, on December 31, 1935, a $23,000,000 deficit in its reserves, which in the report of the convention examiners was said to make the whole company insolvent.[5] The insolvency was reached by the application of an arbitrary actuarial coefficient to the non-can policies, never before used by the actuaries of the company, or by prior convention examiners. The

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[10]R. 1-9.

[1]California Insurance Code, Sec. 1011, Appendix p. 59.

[2]R. 11-32.

[3]R. 12.

[4]R. 63-64.

[5]R. 30.

convention examiners concluded from the application of their arbitrary formula that the premiums collected in the non-can department were insufficient to provide the necessary reserves to meet the risks in that department as they matured in the future.[6] The intangibles, such as the value of agency organizations, goodwill and the like, were not taken into account, although they were found by the court to be worth many millions of dollars.[7]

The other departments showed a surplus of nearly $5,000,000.[8] The actuarial deficit of $23,000,000 from the non-can department was applied to the whole company, wiping out the surplus of $5,000,000 and making the company insolvent by $18,000,000.[9]

The reorganization, which by necessity must have been planned in advance for months, was accomplished in a few moments. The Insurance Commissioner filed in the Superior Court his petition to be appointed conservator of the old company. With the consent of the old company, he was immediately appointed, and title to all of the assets of the old company attempted to be vested in him by a void order of a disqualified judge.[10]

Immediately thereupon and coincident thereto, and as a part of the same proceeding, the Commissioner filed

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[6]R. 11-32.

[7]R. 1386.

[8]R. 31.

[9]R. 31.

[10]R. 1526-1527. Judge Douglas L. Edmonds who made the orders was the owner of a life policy in the old company. R. 323.

another application claiming that his efforts as conservator were futile and praying that he be appointed liquidator.[1] With the consent of the old company, his petition was immediately granted by the entry of another void order.[2] On other petitions filed at the same time the court, by additional void orders,[3] approved the organization of the new company, the issue of all of its stock to the Commissioner, for which he paid $3,000,000 from the cash of the old company, and the Commissioner's reorganization plan, called a "Rehabilitation, Sale and Transfer of Assets and Reinsurance Agreement."[4] This latter document is the whole plan of reorganization. The Commissioner and the old company transferred to the new company all of the assets of the old company except the non-can policies and some rights of action it claimed to hold against derelict directors and officers. All of the above took place and was consummated in a single and continuous proceeding lasting only a few minutes. The non-can policyholders, whose deficit in arbitrarily assumed actuarial reserves had been applied in wrecking the old company, were to be permitted to come into the new company upon accepting the plan and agreeing to keep up the old premium rates and to accept a reduction of benefits on their policies running from 10 to 80 per cent.[5] At the same time Carpenter, as liquidator, joined with

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[1]R. 39-46.

[2]R. 49; R. 1526-1527.

[3]R. 1526-1527.

[4]R. 63-102.

[5]R. 82-83.

the old company in making the conveyance required by the reorganization agreement.[6]

All orders of the court made at that time were absolutely void[7] and no other plan of reorganization has ever been submitted or approved by the court, nor was any other conveyance of the assets ever made.

A board of directors was immediately selected for the new company, officers elected, and it has ever since that time functioned as a separate entity, discharged from all supervision of the Commissioner except that general supervision which he exercises over all insurance companies in the state.

After the reorganization was completed, the court on the following day, by a void order, directed all policyholders and stockholders of the old company to appear and show cause, within a time limited, why the court should not approve the plan of reorganization it had already approved, which plan was functioning through the sale and transfer of assets to the new company. The Commissioner had conveyed everything he had to the new company, and it was operating as a single entity.[8]

Notice of the order to show cause was given by mail to the stockholders and policyholders, and was published in newspapers generally throughout California. Within the time limited by the court, numerous objectors—among them being the petitioners herein—filed their objections to the plan and moved the court to set it aside upon many grounds, including fraud, lack of jurisdiction of the court,

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[6]R. 183-192.
[7]R. 1526-1527.
[8]R. 226-232.

disqualification of the judge who sat, denial of due process under the 14th Amendment to the Federal Constitution, violation of the contract clause of Article 1, Section 10, of the Federal Constitution, and that the Insurance Code itself was unconstitutional.[9]

About three weeks after the reorganization was completed by the void orders of the court, the case was transferred from Judge Edmonds to a qualified judge, Honorable Henry M. Willis.[10] The void orders of Judge Edmonds, made in the lower court, have never been set aside. They stand unimpaired at the moment, affirmed by the highest state court.[1]

On August 11, 1936, Judge Willis made an order attempting to confirm the previous void orders of Judge Edmonds.[2] The case then moved along without incident until September 25, 1936, when Judge Willis, on application of the Commissioner, issued an order to show cause why an amended plan should not be approved *nunc pro tunc* as of July 22, 1936, the date of the void approval of the reorganization by Judge Edmonds, and directed notices of the order to be given to the policyholders and others interested.[3]

The amended plan was the same as the one already approved, with unimportant differences not affecting the policyholders of any class. Many persons interested filed

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[9]R. 233, 329, 681, 684.

[10]R. 323.

[1]R. 322-328. See final order of Judge Willis, R. 1387; R. 1378-1395; R. 1509-1544.

[2]R. 322-328.

[3]R. 905-913.

objections similar to the ones already on file. The Federal questions of lack of due process, and of the impairment of the obligation of contract were again raised.[4]

The lower court held, after a hearing, that the Commissioner's discretion as conservator was supreme and that it was something which the court was powerless to control or guide.[6] The amended plan was again approved on December 4, 1936, but the order was, as before, *nunc pro tunc*, approving the reorganization as of the 22nd day of July, 1936, and making the amended plan effective as of that date.[7] The void orders of Judge Edmonds were reconfirmed. Those void orders are the sole foundation for the proceeding. Without their confirmation the whole proceeding falls. The Supreme Court of California affirmed the whole proceeding in the lower court, rejecting as inapplicable the Federal questions raised.

"This intervenor objects to paragraphs 1 to 9 of the order to show cause, and all amendments thereto, on the ground that if the court should adopt all or any of the proposals set forth in paragraphs 1 to 9 of the order to show cause, it would be a denial of due process of law guaranteed to citizens of the United States by the Fifth and Fourteenth Amendments to the Federal Constitution.

"This objector objects to any plan or scheme which would impair in any manner or way, the obligation of this objector's contract with The Pacific Mutual Life Insurance Company of California."

(Similar objections were made by practically all of the other objectors to the plan.) R. 1275; 1235.

[6] R. 1501.

[7] R. 1378-1395; R. 1396-1444.

B.

Reasons Relied on for the Allowance of the Writ.

1. The Supreme Court of California held that title to all of the assets of the old company (Pacific Mutual Life Insurance Company of California) was lodged in the new company (Pacific Mutual Life Insurance Company) on July 22, 1936, by the Commissioner's conveyance made pursuant to the void orders of the lower court. Section 1011 of the Insurance Code of California[1] provides the only method by which title to the assets of an insolvent insurance company may be vested in the Insurance Commissioner. A valid court order is necessary. The order must be made on a petition of the Commissioner showing that the company is, at the time of the filing of the petition, insolvent or in a hazardous condition. The Insurance Commissioner of California alleged in his sworn petition filed on July 22, 1936,[2] that the old company was insolvent as of December 31, 1935,[3] a date seven months prior to the time of the filing of the petition. Nothing is said about insolvency or hazardous condition on July 22, 1936.

In proceedings of this kind for the forfeiture of title the statute giving the state that right must be strictly construed.[4] Due process was not accorded here because

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[1]Appendix p. 59.

[2]R. 32.

[3]R. 3.

[4]*McDonald v. Katz*, 31 Cal. 167, 169; *Daman v. Hunt*, 47 Cal. App. 274, 280, 281; *Murray v. American Surety Co. of N. Y.* (C. C. A. 9), 70 Fed. 341, 346.

the petition alleging insolvency at a time seven months prior to its filing gave the court no jurisdiction to proceed. It was the only evidence the court had before it when it made the void order of July 22, 1936, and the so-called reappointment and revesting title order of August 11. The remedy is purely statutory. The attempt of the court to appoint a conservator and then a liquidator, vesting the title of the properties in him on this petition was in excess of the statutory remedy, even if the order had not been void. In so vesting title, the state court has decided a Federal question of due process under the 14th Amendment to the Federal Constitution not heretofore determined by this court, and has decided it in a way probably not in accord with an applicable decision of this court.[5]

2. The court (Judge Douglas L. Edmonds) made the order of July 22, 1936, purporting to vest title in the Insurance Commissioner, but that order, as well as all of the orders made by Judge Edmonds, were void because of his disqualification, brought about by his ownership of a policy in the old company.[6]

The Insurance Commissioner immediately organized his new corporation and made a conveyance of the title and possession which he had purportedly acquired, to the new company. Since that time nothing has ever been done to get the title out of the new company or into the old one. The Supreme Court of California, in confirming

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[5]*East Tenn. V. & G. R. v. So. Tel. Co.*, 112 U. S. 306, 310.

[6]R. 1526-27.

this title in the Insurance Commissioner, gained by the void orders of the court, has decided a new and novel question which has never before been decided by this court, namely, that a state may, under its police power, take title to private property in one of its administrative officers, through a court order, required by the statute under which the proceedings are held, although the order vesting the title is void. No decision of this court has been found determining the specific question of due process in issue where title is transferred through a void order of court.

There are many decisions of this court holding that a transfer under a void contract gives the transferee no title.[7] No rational distinction can be made between the effect of a void contract between private parties and a contract which grows out of a court order in a proceeding in which the state is a party, where an order is required to bring the contract into being. The Supreme Court of California has decided this case in a way probably not in accord with the numerous applicable decisions of this court, construing the effect of void contracts between private parties.

3. There is another line of decisions of this court applicable to the question of title with which the decision of the Supreme Court of California is not in accord. Those decisions hold that there is no civil right or legal

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[7] *Desmare v. U. S.*, 95 U. S. 605, 611; *Hall v. Coppell*, 7 Wallace 542, 558; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733; *Meguire v. Corwine*, 101 U. S. 108, 111.

remedy for an illegal act.[8] There are many prior cases in California which are directly in accord with these decisions of the Supreme Court.[9] The Supreme Court of California has held that all of the orders made in consummation of the reorganization were absolutely void.[10] The purported approval of these void orders by the lower state court, and the affirmance of them by the Supreme Court of California, could not make the orders valid in light of the California court's own decisions.[1]

4. At the time of the reorganization, the life policy of petitioner Neblett, along with all of the other similar policies, were transferred to the new company and a new contracting party substituted by void court order in place of the old company. The contracts of petitioners Bettin, Dickinson, MacDonald and all other non-can policyholders were left in the old company, but their terms were changed by the void orders approving the contract of reorganization. The policies of the petitioners, as well as those of most of the policyholders in the old company, were in effect before the new California Insurance Code was adopted.

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[8]*Bank of U. S. v. Owens,* 2 Peters 527, 538, 539; *Pullman Palace Car Co. v. Central Transportation Co.,* 171 U. S. 138, 151.

[9]*Union Collection Co. v. Buckman,* 150 Cal. 159, 165, 166; *Levinson v. Boas,* 150 Cal. 185, 193, 194, 195; *Morey v. Paladini,* 187 Cal. 727, 733.

[10]R. 1526-27.

[1]*Ball v. Tolman,* 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux,* 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club,* 103 Cal. App. 117, 123.

The obligation of the contracts of all of the policyholders with the old company were impaired by the reorganization of the old company under the void orders of the court within the meaning of Article 1, Section 10, of the Federal Constitution. That question has not heretofore been determined by this court and has been decided by the Supreme Court of California in a way probably not in accord with applicable decisions of this court.[2]

5. The Supreme Court of California held in following a provision in the plan of reorganization: "Any life policyholder not assenting to the plan was to file a claim with the Commissioner as liquidator of the old company, all allowed claims to be paid by the new company as limited in the agreement. As to non-can policyholders, the new company was to agree to assume and to reinsure their policies at existing premium rates, but disability payments on such policies were to be assumed on a basis of from 20 per cent to 90 per cent of the face of such policies, depending upon the year of issue. * * * Non-consenting non-can policyholders were to file claims with the commissioner as liquidator of the old company, all [fol. 1516] allowed claims to be assumed by the new company as provided in the agreement."[1]

The court further affirms the same point, saying, "All the dissenter is entitled to is the equivalent of what he would receive on liquidation."[2]

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[2]*Coombes v. Getz*, 285 U. S. 434, 440, 441; *N. W. Pac. Railroad v. Minn.*, 208 U. S. 583, 591.

[1]R. 1520.

[2]R. 1539.

The effect of the holding of the Supreme Court is to decide that the dissenting policyholder is entitled to nothing. No liquidator was ever appointed for the old company. Judge Edmonds did appoint the Insurance Commissioner liquidator at the reorganization date, July 22, 1936, but that order was held to be void.[3]

The record does not show how many policyholders, if any, ever assented to the plan.[4] It can be assumed, in view of the record, that all of the individuals and groups who opposed the plan in the lower court are standing by to see what happens on appeal and that they have never assented to the plan. In the lower court, all persons interested were purportedly represented, either singly or by group-representation.[5]

It appears that no process of law was accorded one who dissented. He had no place to go. His policy was lost, because the court provided no liquidator with whom he could file his claim. The holding is probably not in accord with applicable decisions of this court herein cited, and the question is one of importance, not heretofore determined by this court.

6. The Supreme Court of California has held that under §1043 of the Insurance Code of California which provides that the Commissioner as conservator or liquidator "may, subject to the approval of the court,

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[3]R. 1526-27.

[4]The appeal was taken to the Supreme Court of California within a few days after the order was made. R. 1446.

[5]R. 1514-1516.

* * * enter into rehabilitation agreements" was sufficiently definite and certain to permit of the reorganization of the Pacific Mutual Life Insurance Company of California as done by the Commissioner. The phrase giving the Commissioner the power "to enter into rehabilitation agreements" is so vague and uncertain, open to so many constructions and permits of so many different interpretations by reasonable men, that the reorganization of a corporation under that power by the Commissioner is a question which has never been decided by this court, and is not in accord with probable applicable decisions of this court.[6] In construing what the Commissioner could do under the power given him in the Insurance Code to enter into rehabilitation agreements, the Supreme Court of California went beyond any powers that might even be imputed or inferred by any reasonable person from that phrase when it held that the vague and uncertain phrase gave the Commissioner power to delegate his authority to a corporation deputized as his agent to perform all his powers of liquidation for him.[7]

7. Even more important than the reasons already set out for granting this writ is the great public importance

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[6] *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458-464; *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 238-242; *Connally v. General Construction Co.*, 269 U. S. 385, 391, 392; *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*, 231 N. Y. 51, 131 N. E. 566, 14 A. L. R. 1054, 1056.

[7] *Schechter v. U. S.*, 295 U. S. 495, 529-540; *Hentschel v. Fidelity & Deposit Co of Maryland* (C. C. A. 8), 87 Fed. (2d) 833, 839; *Levezey v. Gorgas*, 4 Dall. 71, 74, 75.

of the case. The Pacific Mutual Life Insurance Company of California had 3,000 stockholders, 300,000 policyholders, $215,000,000 in tangible assets, many millions in intangibles, and approximately $700,000,000 in insurance.

The Company did business throughout the United States, with about 210,000 of its 300,000 policyholders in states other than California.

While these figures are large, the company itself was only sixteenth in size in the United States:

Life insurance is a subject which affects the general public more than any other business. It is the most important business because, through it, heads of families prepare for the maintenance, education and upbringing of their children and the protection of their widows after the death of the insured.

There are about 260 life insurance companies in the United States. They have insurance outstanding of $110,000,000,000, a sum equal to about half of the national wealth, on the lives of most of the wage earners in the country. Annual premiums are paid into these companies of $5,650,000,000, which, in comparison to other great things of interest, is one-third of the cost of the last war to this country, and is approximately one-sixth of the present national debt.

The effect of the decision of the Supreme Court of California is to make it possible in any state in which an insurance company is organized for profit, although doing business under the deceptive name of "mutual," to make as many contracts as its management may devise, but always with the power to impair or destroy these contracts without any process of law and without the observance of the forms of law. That is what has been

done here. The decision sets a precedent which in effect makes an Insurance Commissioner a dictator, determining by a fiat of discretion, based on present expediency, the rights of policyholders in their property. He is, under laws of each state, a political appointee with all the attendant circumstances of influence that go with such an office. If this writ of certiorari is not granted and this decision is allowed to stand, it will become a precedent throughout the United States affecting the fortunes of more than half the people.

It was proudly declaimed in argument before the Supreme Court of California that the Insurance Commissioners of practically all of the states in the United States had approved, fostered and helped effect this plan. It is to be assumed that the commissioners in other states will not be loath to accept the great dictatorial powers, vested in them by the decision of the Supreme Court of this state. Particularly important is the fact that insurance companies are not eligible to liquidation through the Bankruptcy Law of which the reorganization provisions of 77-B are an integral part.[8] In the present state of the law, there is no place for relief but this court.

The decision is so far wrong that, where the California Insurance Code does not give the definite power to do what was done here, the Supreme Court of California

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[8]*Callaghan v. R. F. C.*, 297 U. S. 464, 467; Bankruptcy Act, §4 11 U. S. C. 22; *In re Union Guarantee & Mortgage Co.*, (C. C. A. 2) 75 Fed. (2d) 984, 985.

draws upon some alleged implied powers held to be conferred by the Code. Such implied powers have never before been accorded by the courts to an administrative officer of a state acting in a special statutory proceeding. The Supreme Court of California has gone so far afield in opposition to the accepted principles of law regulating statutory proceedings that a reversal by this Court is vital to the future of the country, in order to prevent this decision from becoming a precedent, and from being used, as such, to destroy the rights of policyholders in insurance companies both in California and in other states of the nation.

It is claimed in the briefs and mentioned in the opinion that the petitioners are the only ones who have appealed. That shows what lengths have been resorted to in order to sustain the decision of the lower court. Due process was not accorded if the contracts of insurance were impaired or if title was forfeited through void orders. The Supreme Court of California says that the orders changing title were void. We agree. These petitioners who are proceeding on behalf of themselves, and all policyholders similarly situated, bring the whole subject to the attention of this court. All of the persons and groups of persons who appeared in the court below are parties to the appeal and are parties to this petition. In the event of a reversal of the judgment, they will obtain all the benefit that would have redounded to them had they appealed.

In this connection, a practical point should be considered. A glance at the record will show that it costs much

more to print it than the average size of the policies in force. The policyholders are unorganized. They cannot be welded into a group, because the insurance company and the Commissioner, in the situation this commissioner finds himself, guard with the greatest secrecy the list of policyholders. Besides, if we have reached that point in our judicial history where, as indicated by the Supreme Court of California, rights are based upon the number of persons who urge them, and not upon the principles of law involved, constitutional government is but a memory, instead of a right.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of California, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. L. A. 16182, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, petitioner and respondent, v. The Pacific Mutual Life Insurance Company of California (a corporation); and the Pacific Mutual Life Insurance Company (a corporation), respondents; William H. Neblett, Vernon Bettin and William George Dickinson, appellants and respondents; Charles Ross Cooper, Rupert B. Turnbull, *et al.*, for themselves and for other non-cancellable policyholders similarly situated and for Francis Adams for himself and for other non-cancellable policyholders

rly situated; George W. Manierre and B. Robert
on their own behalf and on behalf of all similarly sit-
policyholders; Marshall D. Hall and Joseph C. Mc-
s on behalf of themselves and other holders of non-
lable income policies; Neil S. McCarthy on his own
, Ralph R. Huesman and Broadtown Investment
ny, a corporation; Dr. Arthur B. Allen, *et al.;*
Lynn Openshaw, *et al.;* Henry B. Senn; Herbert E.
n; Robert J. Webb and Philip M. Klutznick for
lves and all other persons similarly situated; R.
owitz; Roscoe R. Hess; G. C. Parsons, J. A. Marvin
. R. Snider, *et al.,* on behalf of themselves and all
holders of non-cancellable policies, and as members
otective committee for holders of non-cancellable in-
olicies; Austin O. Martin and Rex Hardy; William
llivan, Insurance Commissioner of the State of
ngton; Arthur E. White; George I. Cochran, *et al.;*
m A. Beckett, *et al.;* Arthur D. Wunner; C. N. Wes-
al.; Wilbur G. Katz, *et al.;* Carl C. Katleman, *et al.,*
nself and all others similarly situated; Andrew J.
Jr.; Ralph C. Hamlin; Rowe Sanderson, *et al;*
Casamajor, *et al.;* Ben S. Hunter; Clara M.
an, *et al.;* John P. Oliver; Harold S. Cook, *et al.;*
Janss, *et al.;* E. A. Conway, Secretary of State of
ana; Carroll C. Day, Harry C. Fabling, Joseph M.
Jack Paschall and Ralph J. Wetzel; J. Parker
on behalf of himself and all other holders of active
n-cancellable income policies issued in the State of
na who may wish to join with him in the proceeding,

respondents; and No. 16222, Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California (a corporation), respondent; Alfred F. MacDonald, appellant and respondent; Charles Ross Cooper, *et al.*, respondents, and that the said decree of the Supreme Court of the State of California may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

WM. H. NEBLETT,
VERNON BETTIN,
WILLIAM GEORGE DICKINSON and
ALFRED F. MACDONALD,
Petitioners.

By WM. H. NEBLETT and
R. DEAN WARNER,
Counsel for Petitioners.

ALFRED F. MACDONALD,
ALLAN H. MCCURDY,
VERNON BETTIN,
Of Counsel for Petitioners.

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1937

No. .....

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON, and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Supreme Court of California is not yet reported. It is printed in the advance opinions of that court, under the title, *Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, v. Pacific Mutual Life Insurance Company of California, et al.* (94 Cal. Dec. 681). It is printed in the record.[1] The lower court rendered an opinion which is not reported, but is printed in the record.[2]

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[1] R. 1509-1544.

[2] R. 1469-1506.

II.

Jurisdiction.

1. The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, as amended by Act of Congress, February 3, 1925. (U. S. C., Title 28, Section 344(b).)

2. The date of the judgment of the Supreme Court of California to be reviewed is December 7, 1937.[3] A petition for rehearing was filed. It was denied January 6, 1938.[4] The judgment of the Supreme Court of California then became final.[5]

3. The case arose out of a reorganization of the Pacific Mutual Life Insurance Company of California in a special proceedings in the courts of California, had under §§1011, 1012, 1013, 1014, 1015, 1016, 1037, and 1043 of the Insurance Code of California.[6] The only issue outside of constitutional questions, federal and state, tried or heard by the lower court, and affirmed by the Supreme Court of California, was whether or not the Insurance Commis-

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[3]R. 1509.

[4]R. 1545.

[5]*Morse v. United States*, 270 U. S. 151, 153, 154

[6]The sections of the California Insurance Code referred to, as well as all other California statutes cited in this brief, are printed in the appendix.

sioner's plan of reorganization was fair and reasonable.[7] The jurisdiction of this Court to grant certiorari is sought because the decision of the Supreme Court of California has denied to the petitioners and all other policyholders similarly situated, due process of law under the Fourteenth Amendment to the Federal Constitution, and has impaired the obligation of their contracts, as prohibited in Article 1, §10 of the Federal Constitution.[8]

4. It is believed that the following cases sustain the jurisdiction of this Court to grant certiorari: *Coombes v. Getz,* 285 U. S. 434; *Whitfield v. State of Ohio,* 297 U. S. 43; *Miller v. McLaughlin,* 281 U. S. 261; *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Green County, Pa.,* 284 U. S. 23; *Doty v. Love,* 295 U. S. 64; *Citizens National Bank of Cincinnati v. Durr,* 257 U. S. 99; *O'Neill v. Leamer,* 239 U. S. 244; *Hartford Life Insurance Co. v. Dowds,* 261 U. S. 476.

III.

Statement of the Case.

A full statement of the case has been given under the heading "A" in the petition. In the interest of brevity, it will not be repeated at this point.

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[7] "That the plan embodied in said rehabilitation and reinsurance agreement, Exhibit 'A,' is feasible, and that operations under said agreement are feasible.

That said rehabilitation and reinsurance agreement, and the plan embodied therein, are, and each of them is, fair, just and equitable."

(Findings by Court-Final Order, Dec. 4, 1936, R. 1386-7.)

[8] *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 680.

IV.

Specification of Errors.

1. The Supreme Court of California erred in holding that due process under the Fourteenth Amendment to the Federal Constitution had been accorded to the policyholders of the old company when their title was forfeited on a petition of the Insurance Commissioner, which petition did not vest jurisdiction in the court.

2. The Supreme Court of California erred in holding that due process was accorded under the Fourteenth Amendment to the Federal Constitution to the policyholders of the old company in forfeiting title of the company and its policyholders to the property and assets of the company by void orders of the court.

3. The Supreme Court of California erred in holding that due process was accorded under the Fourteenth Amendment to the Federal Constitution to the policyholders of the old company when reorganization of the old company was had under the vague and uncertain provision of the Insurance Code of California, giving to the Insurance Commissioner the right "to enter into rehabilitation agreements."

4. The Supreme Court of California erred and denied due process under the Fourteenth Amendment to the Federal Constitution to the petitioners and all other policyholders of the old company in deciding that the Commissioner may delegate the authority, vested in him by statute, to a new corporation as his agent.

5. The Supreme Court of California erred in holding that the policyholders' contracts in the old company were not impaired within the meaning of Article I, Section 10, of the Constitution of the United States, when the terms and provisions of these contracts were changed, both as to substance and parties, by void orders of the court.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

The Supreme Court of California Denied the Petitioners and All Other Policyholders of the Pacific Mutual Life Insurance Company of California Due Process of Law, Under the Fourteenth Amendment to the Federal Constitution, When It Held That the California Courts Acquired Jurisdiction of the Pacific Mutual Life Insurance Company of California and Its Policyholders, on a Petition Which Did Not State Facts Required By the Insurance Code of California to Give the Courts Jurisdiction, and When It Held That Title to the Assets Belonging to the Insurance Company and to Its Policyholders Could Be Vested in the Insurance Commissioner and By Him Transferred to a Reorganized Company on Authority of Court Orders Which Were Absolutely Void.

POINT A.

The California courts never acquired jurisdiction of the Pacific Mutual Life Insurance Company of California, the old company.

Murray v. American Surety Co. of N. Y. (C. C. A. 9), 70 Fed. 341, 346; *Smith v. Westerfield,* 88 Cal. 374, 378; *East Tennessee V. & G. R. Co. v. Southern Tel. Co.,* 112 U. S. 306, 310; *McDonald v. Katz,* 31 Cal. 167, 169; *McAllister v. Story,* 7 Cal. 428, 431; *Daman v. Hunt,* 47 Cal. App. 274, 281; §1011 *California Insurance Code.*

POINT B.

All of the orders made by the court affecting title to the assets of the insurance company and approving their transfer to the reorganized company were void because of the disqualification of the judge who made the orders.

California Civil Code, §305; *Lindsay-Strathmore I. Dist. v. Superior Court,* 182 Cal. 315, 333; *McClaughry v. Deming,* 186 U. S. 49, 67, 68; *Oakley v. Aspinwall,* 3 N. Y. 547, 552; *Marin M. W. Dist. v. North Coast W. Co.,* 178 Cal. 324, 328.

POINT C.

The Supreme Court of California erroneously held that the void orders of Judge Edmonds could be approved, and that the reorganization under these void orders could be validated by subsequent approval.

Ball v. Tolman, 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux,* 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club,* 103 Cal. App. 117, 123; *E. Bement & Sons v. Nat. Harrow Co.,* 186 U. S. 70, 88; *Hall v. Coppell,* 7 Wall. 542, 558; *California Insurance Code,* §1011.

POINT D.

Judge Edmonds' orders were all illegal and void because he was prohibited by the California statute from sitting or acting in the case.

Hall v. Coppell, 7 Wall. 542, 558; *California Code of Civil Procedure,* §170; *Bank of U. S. v. Owens,* 2 Pet. 527, 538; *Meguire v. Corwine,* 101 U. S. 108, 111; *Desmare v. United States,* 93 U. S. 605, 611; *Miller v. Murphy,* 186 Cal. 344, 347; *Jones v. Union Oil,* 218 Cal. 775, 778.

POINT E.

The subsequent orders of a qualified judge confirming the void orders still deny due process.

Tumey v. Ohio, 273 U. S. 510; *Ball v. Tolman*, 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club*, 103 Cal. App. 117, 123; §§1011 & 1043, *California Insurance Code*.

POINT F.

The Commissioner had no authority to make, nor the California courts jurisdiction, to approve a delegation of his duties as conservator or liquidator to a corporation.

§2, Chap. 317, Acts of the Legislature of 1915; *Schechter v. United States*, 295 U. S. 495; *Hentschel v. Fidelity & Deposit Co. of Maryland* (C. C. A. 8), 87 Fed. (2d) 833, 839; *Levezey et al. v. Gorgas et al.*, 4 Dall. 71, 74, 75.

POINT G.

The power to reorganize cannot be implied from the right of the Commissioner as conservator to enter into rehabilitation agreements.

New York Title & Mtg. Co. v. Freedman, 276 N. Y. S. 72; *In re Title & Mtg. Guarantee Co.*, 274 N. Y. S. 270; *In re Title & Mtg. Guarantee Co.*, 275 N. Y. 353.

POINT H.

The provision in the Insurance Code of California that the Commissioner "may enter into rehabilitation agreements" is so vague and uncertain as to be unconstitutional.

Connally v. General Constr. Co., 269 U. S. 385, 391; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458, 464; *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*,

231 N. Y. 51, 14 A. L. R. 1054, 1056; *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 239; *Doty v. Love*, 295 U. S. 64.

POINT I.

The joinder of the old company with the Commissioner in the conveyance to the new company was fraudulent and void.

California Civil Code, §3439 and 3442; *Northern P. R. Co. v. Boyd*, 228 U. S. 482, 502-507; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 680; *Postal Telegraph-Cable Co. v. City of Newport*, 247 U. S. 464; *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 160, 161.

The Contracts of the Petitioners and All Other Policyholders Have Been Impaired in Violation of Article 1, Section 10, of the Federal Constitution. The Contracts of the Life Policyholders Have Been Violated by Compelling Them to Accept the New Company As the Insurer in Place of the Old. The Contracts of the Non-cancellable Accident and Health Policyholders Have Been Impaired by Compelling Them to Take a Reduction of Benefits. The Contracts of Both the Life and Non-cancellable Policyholders Have Been Impaired by Destroying Their Rights to Any Benefits Under the Reorganization Unless They Assent to It.

POINT J.

The contracts of the petitioners and all other policyholders have been impaired in violation of Article 1, Section 10 of the Federal Constitution.

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 591; *Levy v. Dunn*, 160 N. Y. 504; 73 Am. St. Rep. 699, 701, 702.

POINT A.

The California Courts Never Acquired Jurisdiction of the Pacific Mutual Life Insurance Company of California.

On July 22, 1936,[1] the Insurance Commissioner of California brought a proceeding under §1011 of the Insurance Code of that state to take over the Pacific Mutual Life Insurance Company of California. The case was the first insolvency proceeding under the new code to reach the Supreme Court of California. That court determined the character of the proceeding by holding that it was purely statutory and special.[2] In such a case strict compliance must be had with the statute or the court will acquire no jurisdiction of the *res* or of the parties, and its judgment is absolutely void. (*Murray v. Am. Surety Co. of N. Y.* (C. C. A. 9), 70 Fed. 341, 346.)[3]

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[1]R. 1-9.

[2]R. 1530-1531.

[3]"The fact that there are other provisions of the Code of California which authorize the court, in other proceedings, to appoint a receiver, cannot be said to authorize the court to appoint a receiver in proceedings instituted under the provisions of section 11 of the bank commissioners' act. Courts do not make the laws. They interpret them. If there is no warrant in the statute for the doing of an act, courts cannot supply the defect. There is nothing in the contention of counsel for plaintiff in error that will 'justify us in interploating into the statute something that the legislature has omitted.' People's Sav. Bank v. Superior Court of San Francisco, 103 Cal. 33, 36 Pac. 1015. In whatever light this question may be viewed, we are

That case arose under an early California bank act. It cites cases in point from the Supreme Court of California and from this court to support the unquestioned soundness of its doctrine.[4]

The Commissioner's sworn application filed on July 22, 1936, showed the Pacific Mutual Life Insurance Company of California to have been insolvent on December 31, 1935. The Supreme Court of California has always said of insolvency proceedings: "The proceedings are special and no intendments can be made in favor of the

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brought directly face to face with the unquestioned rule of law that in all special statutory proceedings the measure of the court's power is the statute itself. See authorities before cited: Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; East Tennessee V. & G. R. Co. v. Southern Tel. Co., 112 U. S. 306, 5 Sup. Ct. 168; Wells, Jur. Sec. 70; High, Rec., Sec. 43 * * *

"But the judgment of a court having no jurisdiction of the subject-matter or the parties, or the exercise of a power by the court not authorized by the statute in purely statutory proceedings, is utterly null and void, and may be collaterally assailed. Griffith v. Frazier, 8 Cranch. 9; Elliott v. Peirsol, 1 Pet. 333, 340; Wilcox v. Jackson, 13 Pet. 498, 511; Bigelow v. Forrest, 9 Wall. 351; Windsor v. McVeigh, 93 U. S. 274, 282; U. S. v. Walker, 109 U. S. 258, 3 Sup. Ct. 277; Reynolds v. Stockton, 140 U. S. 254, 268, 11 Sup. Ct. 773; Hatch v. Ferguson, 15 C. C. A. 201, 68 Fed. 45; Munday v. Vail, 34 N. J. Law, 419."

Murray v. American Surety Co. of New York (C. C. A. 9), 70 Fed. 341, 346.

[4]*Smith v. Westerfield,* 88 Cal. 374, 378; *East Tennessee V. & G. R. Co. v. Southern Tel. Co.,* 112 U. S. 306, 310.

jurisdiction. Everything bearing upon that question must appear affirmatively."[5]

The section (Cal. Ins. Code, §1011)[6] requires the courts, upon the filing of a proper petition, to appoint the Insurance Commissioner conservator and to vest the title to the properties of the insolvent insurance company in him. No other evidence is required. This is a vital reason for holding the Commissioner strictly to the necessary allegations of jurisdiction.

There was no evidence before the court or nothing by which it could determine that the company was insolvent on July 22, 1936, seven months after the date of insolvency shown in the application. The Supreme Court of California has held that where the first notice of publication to creditors in an insolvency proceedings took place 28 days before the meeting of creditors, when the statute required 30 days, it was not an irregularity, but that because the proceedings were special, the judgment of the court rendered thereon was absolutely void.[7]

The statute (§1011 Cal. Ins. Code) is specific. It says that the Commissioner's verified application must show "conditions to exist." The fact that a condition of insolvency was present on December 31, 1935, was no evidence whatever that it existed on July 22, 1936, the date of the filing of the petition and the making of the orders. The general definition of "exist" as found in all of the

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[5]*McDonald v. Katz,* 31 Cal. 167, 169; *McAllister v. Story,* 7 Cal. 428, 431; *Daman v. Hunt,* 47 Cal. App. 274, 281.

[6]Appendix p. 59.

[7]*McDonald v. Katz,* 31 Cal. 167, 169, 170.

dictionaries is, "to continue to be" or "to live". Without a showing that the insolvency "continued to be", or in the language of the statute, "existed" on July 22, 1936, the court had no jurisdiction to proceed, and for this reason alone every order made in the proceeding by the court is absolutely void. There is little necessity for arguing that due, or any, process can be accorded through a void order. To claim that a state officer may seize the title and possession of property by authority of a void court order is to say that his office gives him powers of a czaristic nature.

POINT B.

All of the Orders Made by the Court Affecting Title to the Assets of the Insurance Company and Approving Their Transfer to the Reorganized Company Were Void Because of the Disqualification of the Judge Who Made the Orders.

Judge Douglas L. Edmonds, the Superior Court judge who purportedly appointed the Insurance Commissioner conservator, vested title in him and approved the reorganization and transfer from the old company to the new by the Commissioner of all of the assets of the old, was the holder of a life policy in the old company.[1]

The Supreme Court of California correctly held in its opinion that all of the orders of Judge Edmonds were absolutely void.[2]

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[1]R. 323.

[2]R. 1526-1527.

The new company, since receiving the properties of the old, by authority of these void orders, on July 22, 1936, has continued from that date to the present to operate, through its own board of directors, the business and affairs of the new corporation, claiming unto itself the title to the assets lodged in it by the admittedly void orders of Judge Edmonds. No other transfer has ever been made.

Although the Commissioner is the sole stockholder of the new company, that gives him no right to operate the business of the new company which now claims title to all assets of the old. The management of that company is by law vested in its board of directors.[3]

A void order was made by Judge Edmonds on July 23, 1936, directing all parties interested to appear and show cause why his void orders, made on the day before, should not be approved. The old company had previously appeared and consented in writing to the making of the void orders by Judge Edmonds.[4] After the notice was given, the petitioners herein and all of the respondents, except the Insurance Commissioner and the old and new corporations, appeared and filed objections to what had

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[3]"POWERS OF DIRECTORS.—Subject to limitations of the articles and of this title as to action to be authorized or approved by the shareholders, all corporate powers shall be exercised by or under authority of, and the business and affairs of every corporation shall be controlled by a board of not less than three directors."

Cal. Civil Code, §305.

[4]R. 33, 48.

been done. It was claimed by respondents, the Insurance Commissioner and the old and new companies, and tacitly approved by the Supreme Court of California, that the consent of the old company and the appearance of the others, making objection to the orders, waived the void character of the orders. That position is not well taken, because there was no jurisdiction shown on the face of the petition. But more important on this point is the uniform rule that where a disqualification of a judge exists, it is jurisdictional and cannot be waived. That is the rule in California.[5] The principle is supported by a wealth of authority.[6] Jurisdiction of the subject-matter cannot be conferred by consent.[7]

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[5]"It is also the uniform rule, under these statutes, that where such disqualification exists, consent of the parties cannot impart validity to the proceedings and that a party to the action who desires to attack them is not estopped from doing so by the fact that he attended during the trial without raising the objection."

Lindsay-Strathmore I. Dist. v. Superior Court, 182 Cal. 315, 333.

[6]*McClaughry v. Deming*, 186 U. S. 49, 67, 68; *Oakley v. Aspinwall*, 3 N. Y. 547, 552.

[7]"It is the universal rule that jurisdiction of the subject matter cannot be conferred upon a tribunal by consent, and it follows that the parties cannot make an effective waiver of a lack of such jurisdiction."

Marin M. W. Dist. v. North Coast W. Co., 178 Cal. 324, 328.

POINT C.

The Supreme Court of California Erroneously Held That the Void Orders of Judge Edmonds Could Be Approved, and That the Reorganization Under These Void Orders Could Be Validated by Subsequent Approval.

The Supreme Court of California held that although Judge Edmonds' orders were void, their subsequent approval by a qualified judge made them valid.[5]

The Supreme Court of California, after holding that the orders of court were void, nevertheless affirmed the decision upon the theory that the Insurance Commissioner on July 22, 1936, took possession of the assets of the company, which the court held he could do without a court order.[6]

It was impossible in view of the cases from all the courts, California included, to the effect that statutory proceedings must be strictly followed, that Carpenter could start out under §1011 of the Insurance Code, and when he found himself off on tangent, he could be helped out of his dilemma by the court's finding that he did not intend to proceed as he had, but was, on the contrary, proceeding under §1013 by summary seizure.

The Supreme Court of California gives no effect to §1015 providing that "immediately after such seizure the

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[5]R. 1521.

[6]R. 1528.

Commissioner shall institute proceedings as provided under §1011 and thereafter shall proceed in accordance with the provisions of this Article."

"Immediately" does not permit of delay. The record establishes that Carpenter never intended to proceed under §1013.[7] However, if he had done so, he was required "immediately" to file his petition under §1011. The petition he did file was in such form that the court was without jurisdiction to proceed. If he had surmounted those difficulties, he would still have been faced with the void orders of a disqualified judge, upon which everything that has been done in these proceedings, rests.

It was a denial of due process to affect the rights of the policyholders and others interested by void orders. No right can arise from a void order. That is the unquestioned rule in every jurisdiction. It is particularly well founded in California.[8] It is the rule of this court.[9]

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[7] R. 1-9; R. 7; R. 10.

[8] *Ball v. Tolman*, 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club*, 103 Cal. App. 117, 123.

[9] *E. Bement & Sons v. Nat. Harrow Co.*, 186 U. S. 70, 88; *Hall v. Coppell*, 7 Wall. 542, 558; *Tumey v. Ohio*, 273 U. S. 510, 522-524, 535.

POINT D.

Judge Edmonds' Orders Were All Illegal and Void Because He Was Prohibited by the California Statute From Sitting Or Acting in the Case.

There are several cases decided by this Court that are applicable, with which the decision of the Supreme Court of California is not in accord. In a leading case on this subject it is held that no rights can arise out of an illegal contract.[10]

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[10]"The instruction given to the jury, that if the contract was illegal, the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *Ex dolo malo non oritur actio,* is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

Hall v. Coppell, 7 Wall. 542, 558.

The orders of Judge Edmonds were void because they were illegal. Section 170[1] of the Code of Civil Procedure of California prevented a judge with Judge Edmonds' interest from sitting or acting in the case. Where a disqualified judge does sit or act, his acts are void because they are prohibited by law. There are numerous other cases of this Court upholding the general principle.[2]

The cases cited refer to contracts which are illegal. It is well established in California that a judgment is a contract.[3] A judgment, being a contract, the cases referring to illegal contracts apply.

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[1]"No justice, judge or justice of the peace shall sit or act as such in any action or proceeding:

2. In which he is interested as a holder or owner of any capital stock of a corporation or of any bond, note or other security issued by a corporation."

California Code of Civil Procedure, §170.

[2]*Bank of U. S. v. Owens*, 2 Pet. 527, 538; *Meguire v. Corwine*, 101 U. S. 108, 111; *Desmare v. U. S.*, 93 U. S. 605, 611.

[3]*Miller v. Murphy*, 186 Cal. 344, 347; *Jones v. Union Oil*, 218 Cal. 775, 778.

POINT E.

The Subsequent Orders of a Qualified Judge Confirming the Void Orders Still Deny Due Process.

After the reorganization was an accomplished fact and it had been discovered that everything done up to that time was invalid because of the disqualification of Judge Edmonds, Judge Willis, a qualified judge, was brought in.[4] Beginning with the first order of Judge Willis on August 11, 1936, until the final order in the case on December 4 of the same year, the one object and purpose, as shown by the orders made, was to confirm and make valid the void orders of Judge Edmonds.[5]

In an attempt to remove the infirmity from the void orders under which the reorganization had been effected, the respondents had Judge Willis on August 11, 1936, make an order confirming the orders of Judge Edmonds theretofore made, and procured from him the reappointment of the Insurance Commissioner as conservator of the old company, and an order attempting to revest title in him.[6] Of course, at that time there was nothing to conserve, nor any title in the old company to be vested in the Commissioner because he had parted with everything he had by his prior conveyance to the new company.[7] The new company then had the title and possession, still has them, and will continue to keep them, unless this Court should hold that due process was denied the peti-

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[4]R. 323.

[5]R. 322-328; R. 1378-1395.

[6]R. 322-328.

[7]R. 183-92.

tioners and others in like circumstances when their property was taken from them by void orders. It was vital to the Insurance Commissioner that the void orders of Judge Edmonds be confirmed, but it was impossible to vest title in him without first taking back the title from the new company. The orders of Judge Willis confirming title in the new company and vesting title in the Insurance Commissioner are conflicting and destroy themselves.

Judge Willis then, on September 25, 1936, made another order to show cause. But this order was similar to every other order made by him. It merely directed the persons interested to appear and show cause why the void orders of Judge Edmonds should not be approved.[8] Approximately the same persons who answered the first order to show cause came in and objected to the second. The plan was again presented for approval. It was not amended in so far as any policyholder was concerned. As to the policyholders, it remained exactly the same.[9]

The final order of December 4 but confirmed *nunc pro tunc* the orders of Judge Edmonds.[1]

The Supreme Court of California decided that approval of the void orders was due process. If it had not so decited, the reorganization completed on July 22, 1936, would have been upset. It is indeed novel and unusual

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[8]R. 905-913, 906; R. 909.

[9]R. 53-102; R. 888-904; R. 1396-1443.

[1]R. 1387-1388.

that the Supreme Court of California should affirm the orders of Judge Willis confirming the void orders of Judge Edmonds, when the Supreme Court of California holds itself powerless to affirm a void order, and if done, the order is still void.[2]

It must be again mentioned that the Supreme Court of California upholds the Insurance Commissioner's position, established by the void orders of Judge Edmonds, in deciding that the Commissioner could jump the requirements of §1011 of the Insurance Code, organize his new corporation under the implied powers given him under §1043 to enter the rehabilitation agreements, and convey the assets of the old company to the new, without the aid of §1011. That is all judge-made law, applied without process or statutory authority of any sort, and directly opposed to all principles of law regulating the duty of a court in a special statutory proceeding. The decision confers dictatorial powers upon the Commissioner of a character never contemplated by the Insurance Code or by any other statute, and is in plain violation of the Federal Constitution.

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[2]*Ball v. Tolman,* 135 Cal. 375, 380; *Pioneer Land Co. v. Maddux,* 109 Cal. 633, 642; *Tyler v. Park Ridge Country Club,* 103 Cal. App. 117, 123.

POINT F.

The Commissioner Had No Authority To Make Nor the California Courts Jurisdiction To Approve, a Delegation of His Duties As Conservator or Liquidator to a Corpration.

Likewise, the Insurance Commissioner could not delegate his authority to a corporation or appoint an agent or deputy, except as permitted by law. His right to appoint agents or deputies is regulated by §1035 of the Insurance Code.[5] A corporation is ineligible to be an agent or deputy of an Insurance Commissioner, because the General Laws of California provide that no person, except naturalized or native-born citizens may be employed or deputized by the Insurance Commissioner or any other public officer.[6] A corporation is not naturalized or native-born. The decision of the Supreme Court of California, that Carpenter could so appoint or deputize his new corporation, under the Code,

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[5]Appendix p. 63.

[6]"No person except a native born or naturalized citizen of the United States, shall be employed in any department of the state, county, city and county or city government in this state, * * *"

§1, chap. 417, Acts of the Legislature of 1915.

"It shall be unlawful for any person, whether elected, appointed or commissioned to fill any office in either the state, county, city and county or city government of this state, or in any department thereof, to appoint or employ any person to perform any duties whatsoever, unless such person so appointed or employed be a native born or naturalized citizen of the United States, * * *."

§2, chap. 317, Acts of the Legislature of 1915.

is void, because it is a direct violation of law. Here again is another failure to apply the due process guaranteed by the Federal Constitution. An Insurance Commissioner cannot, without violation of due process, accorded by the Federal Constitution, delegate his authority to a corporation whose board of directors manage the company and over whom he would have no control.[7]

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[7]*Schechter v. United States,* 295 U. S. 495.

"The corporation was a going concern. In such case, and in any case where an insurance corporation, whether solvent or insolvent, whether actually operating or not, where the interests of the policy holders require it, the Superintendent of Insurance could manifestly take possession and control of the assets, and in general it may be said that neither he nor a court could delegate to another the duty which the statutes of Missouri cast upon him in liquidating and administering the assets and affairs of the insurance corporation."

Hentschel v. Fidelity & Deposit Co. of Maryland (C. C. A. 8), 87 Fed. (2d) 833, 839.

"It gave them, however, no power to delegate their trust and authority to others; nor to erect a new and arbitrary tribunal, to determine future controveries. If the first, set of referees could proceed in this way, the set empowered by them, might exercise a similar authority; and so *ad infinitum,* compel the parties, without their consent, or control, to resort to a tribunal unknown to our laws. We are, therefore, unanimously of opinion, that the referees exceeded their authority; and as their report, or award, was confirmed, generally, by the Supreme Court, the judgment of that court must, also, be generally, reversed."

Levezey et al v. Gorgas et al., 4 Dall. 71, 74, 75.

POINT G.

The Power to Reorganize Cannot Be Implied From the Right of the Commissioner as Conservator to Enter Into Rehabilitation Agreements.

The Supreme Court of California had, in order to confirm the orders of the lower court, to hold that the implied power to reorganize was granted by §1043 of the Insurance Code, which merely gives the Commissioner, as conservator or as liquidator, the right "to enter into rehabilitation agreements." In order to reach this conclusion the court had to draw upon implied powers said to be granted by the statute in this special proceeding. There are no powers which may be implied from a special statute.

Several New York cases were cited by the Supreme Court of California to support the implied powers it held the Insurance Commissioner of California might exercise under the right "to enter into rehabilitation agreements."[1] There are a number of New York cases construing the New York Insurance Law which hold that rehabilitation contemplates the continuance of the corporate life and activities of the old company. The continuance of the corporate life of the old company or its restoration was not contemplated by the Insurance Commissioner of California in his reorganization. Those cases also hold that rehabilitation means an attempt to conserve and administer the assets of a corporation in the hope of its eventual return from financial distress to solvency.[2] The Insurance

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[1]R. 1535-1537.

[2]*New York Title & Mtg. Co. v. Friedman*, 276 N. Y. S. 72; *In re Title & Mtg. Guarantee Co.*, 274 N. Y. S. 270, 276; *In re New York Title & Mtg. C* , 275 N. Y. 353, 354.

Commissioner of California intended to, and did, kill the old corporation.

It is immaterial whether the New York courts in the cases[3] cited by the Supreme Court of California approved reorganizations or rehabilitations. If reorganizations, there is a provision in the statute of New York providing for them. Where these cases were reorganizations, the courts of New York did not have to draw upon any implied powers, because §52[4] of the New York Insurance Law provides specifically for a reorganization and the method by which it may be accomplished. There is no counterpart in the California Insurance Code.

The Supreme Court of California, after a long and erroneous discussion on the New York cases, winds up with the declaration of an implied power in the Commissioner as follows: "If to rehabilitate such business—a new corporation must be organized, the power clearly exists."[5]

POINT H.

The Provision in the Insurance Code of California That the Commissioner as Conservator "May Enter Into Rehabilitation Agreements" Is So Vague and Uncertain as To Be Unconstitutional.

The phrase under which the reorganization was permitted, "may enter into rehabilitation agreements," is so vague and uncertain, setting no ascertainable standard by which its meaning can be determined, that any action

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[3]R. 1535-1537.

[4]Appendix p. 65.

[5]R. 1537-38.

under it violates the first essential of due process of law.[3] The rule, as stated, is well established and has been reaffirmed in a more recent case.[4]

The respondents undoubtedly will claim that the cases cited were criminal, and that in a civil action the rule is not applicable. That question was considered by the New York Court of Appeals where it was held that the rule is exactly the same in both civil and criminal actions.[5] The New York rule as established by that case has been adopted by this Court and applied by it in a civil case.[6]

Much store has been put by the decision of this Court in *Doty v. Love*[7] because it was held there that the Superintendent of Banks in the State of Mississippi could classify bank creditors, pay certain classes a larger sum on their claims than others, and then reopen the bank by the organization of a new corporation. The case is not applicable in any particular. First, because the Mississippi statute expressly provided in definite terms for

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[3]"And a statute which either forgets or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Connally v. General Constr. Co., 269 U. S. 385, 391.

[4]*Cline v. Frink Dairy Co.*, 274 U. S. 445, 458-464.

[5]*Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*, 231 N. Y. 51, 14 A. L. R. 1054, 1056.

[6]*Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 239.

[7]*Doty v. Love*, 295 U. S. 64.

everything that was done in that case. Second, the orders of reorganization made by the Mississippi courts were valid and not void, as was the situation here. And third, there was no vagueness or uncertainty in the statute which specifically provided how the superintendent might reopen the bank.

The Supreme Court of California says: "This method of rehabilitation by the formation of a new company is obviously contemplated by the Insurance Code,"[8] forgetting that there are no contemplated procedures under a special statute. There is no power to do anything under a special statute that is not specifically authorized.

Section 1037(d) of the Insurance Code[9] is held by the Supreme Court of California as giving the Commissioner authority to make the transfer of July 22, 1936. The section provides that after the Commissioner has taken possession of property under the insolvency provisions of the Code, he may either as conservator or liquidator, sell, transfer or otherwise dispose of or deal with any real or personal property at its reasonable market value. If the property is worth more than a thousand dollars, the sale can only be made in accordance with the terms and conditions prescribed by the court. The sale and transfer here were made without any order of the court, the attempted orders being absolutely void.

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[8]R. 1535.

[9]Appendix p. 64.

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POINT I.

The Joinder of the Old Company With the Commissioner In the Conveyance to the New Company Was Fraudulent and Void.

The theory upon which the Supreme Court of California held that the Commissioner had the right to make the transfer from the old to the new company was that the old company was insolvent.[1] The Supreme Court of California concedes that the transfer could only have been made by the Commissioner. If done by the old company, the fraudulent conveyance statutes of California would have made the conveyance void.[2] The purpose and intent of these statutes are swept aside by the statement of the Supreme Court of California, "Here the transfer was made pursuant to a valid statute after court approval,"[3] meaning, of course, that the Commissioner's conveyance, although supported only by a void order, was valid.

This is an impossible position, because the Supreme Court of California has held the court's approval of the transfer was absolutely void. That court goes on to say, "Clearly there can exist no intent to defraud when the transfer is made under the terms of a valid statute pursuant to a court order."[4]

The court was in error in making this statement of fact and the conclusion it drew therefrom. The only conveyance ever made by the Commissioner was on July 22, 1936,

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[1]R. 1541.

[2]*Cal. Civil Code*, §3439 and 3442, Appendix p. 59.

[3]R. 1541.

[4]R. 1541

pursuant to the orders of Judge Edmonds made on that day, which the Supreme Court of California held to be absolutely void. The Commissioner's conveyance being held void, it is not helped by the old company's joining therein, because its joinder was void under the fraudulent transfer sections of the California Civil Code.[5]

The decision of the Supreme Court of California is not in accord with an applicable decision of this Court.[6]

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[5] *Cal. Civil Code,* §3439 and 3442, Appendix p. 59.

[6] "Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt, the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company. *Cf.* San Francisco & N. P. R. Co. v. Bee, 48 Cal. 398; Grenell v. Detroit Gas Co., 112 Mich. 70, 70 N. W. 413. There is no difference in principle if the contract reorganization, instead of being effectuated by private sale, is consummated by a master's deed under a consent decree."

Northern P. R. Co. v. Boyd, 228 U. S. 482, 502.

We now urge the well established rule of this Court, in anticipation of the argument of respondents that the violation here was judicial rather than legislative. This Court has said, "The federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branches of government."[7]

THE CONTRACTS OF THE LIFE POLICYHOLDERS HAVE BEEN VIOLATED BY COMPELLING THEM TO ACCEPT THE NEW COMPANY AS THE INSURER IN PLACE OF THE OLD. THE CONTRACTS OF THE NON-CANCELLABLE ACCIDENT AND HEALTH POLICYHOLDERS HAVE BEEN IMPAIRED BY COMPELLING THEM TO TAKE A REDUCTION OF BENEFITS. THE CONTRACTS OF BOTH THE LIFE AND NON-CANCELLABLE POLICYHOLDERS HAVE BEEN IMPAIRED BY DESTROYING THEIR RIGHTS TO ANY BENEFITS UNDER THE REORGANIZATION UNLESS THEY ASSENT TO IT.

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[7] *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 680; *Postal Telegraph-Cable Co. v. City of Newport*, 247 U. S. 464; *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 160, 161.

POINT J.

The Contracts of the Petitioners and All Other Policyholders Have Been Impaired in Violation of Article I, Section 10 of the Federal Constitution.

The insolvency provisions of the California Insurance Code became effective in September, 1935. The policies of all of the petitioners, as well as those of practically all of the policyholders in the old company, antedated the effective date of the California Insurance Code. The judgment of the Supreme Court of California gives effect to subsequent legislation which impairs the existing contracts of policyholders, and thus brings the case under the jurisdiction of this Court.

The impairment of the contracts grew out of changing the terms and conditions of the non-cancellable policies, that is, cutting down the benefits to the policyholders.[1]

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[1] "We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or the binding force of the former contract. The legislation which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court."

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 591.

The change in the life policies came in substituting for the old company, without the consent of the policyholders, the new company as the other contracting party to the policyholders' contracts.[2]

Having impaired the contracts of the policyholders in this manner, the plan left any policyholder who did not assent to the plan without right to file his claim with the liquidator of the old company.[3] There was never any liquidator, consequently all of the policyholders were forced to assent to the plan, or be left with absolutely nothing. There could be no greater case of impairment of the obligation of contracts, or a denial of the equal protection of the law. The policyholders had to assent, or see their policies lost. The court, in approving the plan, made no provision whatever for non-consenting policyholders. Giving to the policyholders who failed to assent to the plan, the right to file their claims with the non-existent liquidator was the deprivation of every due process and an impairment of contract.

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[2] *Levy v. Dunn*, 160 N. Y. 504; 73 Am. States Reports 699, 701, 702.

[3] R. 1440-41; R. 1520.

Conclusion.

It is therefore respectfully submitted that this case is one of great public interest, showing a clear violation, by the Supreme Court of California, of due process, as accorded to individuals by the Fourteenth Amendment to the Federal Constitution, and of the impairment of the obligation of contract as prohibited by Article I, Section 10 of the Federal Constitution, and that the case calls for the exercise by this Court of its powers to such end that a Writ of Certiorari should be granted and this Court should review the decision of the Supreme Court of California, and finally reverse it.

Respectfully submitted,

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APPENDIX.

CALIFORNIA CIVIL CODE, Sections 3439 and 3442:

§3439. TRANSFERS, ETC., WITH INTENT TO DEFRAUD CREDITORS. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor. [Enacted 1872.]

§3442. INTENT AS QUESTION OF FACT. In all cases arising under section twelve hundred and twenty-seven, or under the provisions of this title, except as otherwise provided in section thirty-four hundred and forty, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors. [Enacted 1872; Amended by Stats. 1895, p. 154.]

CALIFORNIA INSURANCE CODE OF 1935, Sections 1011, 1012, 1013, 1014, 1015, 1016, 1025, 1035, 1037, 1043:

§1011. Upon the filing, by the commissioner, with the superior court in the county in which is located the principal office of such person in this State, of a verified application showing any of the following conditions to exist:

(a) That such person has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the commissioner or his deputy or examiner.

(b) That such person has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer.

(c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person.

(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or creditors, or to the public.

(e) That such person has violated its charter or any law of the State.

(f) That a certificate of authority of such person has been revoked under section 10711.

(g) That any officer of such person refuses to be examined under oath, touching its affairs.

(h) That any officer or attorney-in-fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person.

(i) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked;

Or, upon the filing, by the commissioner, of a verified application accompanied by a certified copy of the commissioner's last report of examination of any person to whom the provisions of this article apply showing such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this code, said court shall issue its order vesting title to all of the assets of said person, wheresoever situated, in the commissioner or his successors in office, in his official capacity as such, and directing the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until a further order of said court.

§1012. Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business.

§1013. Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately, the commissioner, without notice and before applying to the court for any order, forthwith shall take possession

of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court. Any person having possession of and refusing to deliver any of the books, records or assets of a person against whom a seizure order has been issued by the commissioner, shall be guilty of a misdemeanor and punishable by fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both such fine and imprisonment.

§1014. Whenever the commissioner makes any seizure as provided in section 1013, it shall, on the demand of the commissioner, be the duty of the sheriff of any county of this State, and of the police department of any municipal corporation therein, to furnish him with such deputies, patrolmen or officers as may be necessary to assist the commissioner in making and enforcing any such seizure.

§1015. Immediately after such seizure, the commissioner shall institute a proceeding as provided for in section 1011 and thereafter shall proceed in accordance with the provisions of this article.

§1016. If at any time after the issuance of an order under section 1011 it shall appear to the commissioner that further efforts to proceed under said section would be futile, he may apply to the court for an order to liquidate and wind up the business of said person. Upon a full hearing of such application, the court may make an order directing the winding up and liquidation of the business of such person by the commissioner, as liquidator. The title to all property and assets of such person, vested in the commissioner under section 1011, shall remain in the commissioner, as liquidator, for the purpose of car-

rying out the order to liquidate and wind up the business of such person.

§1025. Claims founded upon unliquidated or undetermined demands must be filed within the time limit provided in this article for the filing of claims, but claims founded upon such demands shall not share in any distribution to creditors of a person proceeded against under section 1016 until such claims have been definitely determined, proved and allowed. Thereafter, such claims shall share ratably with other claims of the same class in all subsequent distributions.

An unliquidated or undetermined claim or demand within the meaning of this article shall be deemed to be any such claim or demand upon which a right of action has accrued at the date of the order of liquidation or accrues within the time limit provided in this article for the filing of claims, and upon which the liability has not been determined or the amount thereof liquidated; provided, however, that claims founded upon judicial surety bonds and undertakings securing unmatured obligations shall be deemed to be unliquidated and undetermined demands within the meaning of this section.

§1035. In any proceeding under this article, the commissioner shall have the power to appoint and employ under his hand and official seal, special deputy commissioners, as his agents, and to employ such clerks and assistants and to give to each of them such power as may by him be deemed necessary. The compensation of special deputy commissioners, clerks and assistants appointed to carry out the provisions of this article, and all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business

and property of such person under this article, shall be fixed by the commissioner, subject to the approval of the court, and shall be paid out of the assets of such person.

§1037. Upon taking possession of the property and business of any person in any proceeding under this article, the commissioner, exclusively and except as otherwise expressly provided by this article, either as conservator or liquidator:

(d) Shall have authority without notice, to acquire, hypothecate, encumber, lease, improve, sell, transfer or otherwise dispose of or deal with, any real or personal property of any such person at its reasonable market value, or, in cases other than acquisition, sale or transfer on the basis of reasonable market value, upon such terms and conditions as he may deem proper; provided, however, that no transaction involving real or personal property shall be made where the market value of the property involved exceeds the sum of one thousand dollars without first obtaining permission of said court, and then only in accordance with such terms as said court may prescribe;

§1043. In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, or enter into *rehabilitation agreements*. Such rehabilitation or reinsurance agreements shall provide that, subsequent to the date thereof and for such period of time as as the commissioner may determine, no investment or reinvestment of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the commissioner.

NEW YORK INSURANCE CODE, Section 52:

§52. REORGANIZATION OF EXISTING CORPORATIONS AND AMENDMENT OF CERTIFICATES.

1. Any domestic corporation existing or doing business on October first, eighteen hundred and ninety-two, may, by a vote of a majority of its directors or trustees, accept the provisions of this chapter and amend its charter to conform with the same, upon obtaining the consent of the superintendent of insurance thereto in writing; and thereafter it shall be deemed to have been incorporated under this chapter, and every such corporation in reincorporating under this provision may for that purpose so adopt in whole or in part a new charter, in conformity herewith, and include therein any or all provisions of its existing charter, and any or all changes from its existing charter, to cover and enjoy any or all the privileges and provisions of existing laws which might be so included and enjoyed if it were originally incorporated thereunder, and it shall, upon such adoption of and after obtaining the consent, as in this section before provided, to such charter, and filing the same and the record of adoption and consent in the office of the superintendent of insurance, perpetually enjoy the same as and be such corporation, which is declared to be a continuation of such corporation which existed prior to such reincorporation; and the offices therein which shall be continued shall be filled by the respective incumbents for the periods for which they were elected, and all others shall be filled in the same manner by such amended charter provided.

2. Every domestic insurance corporation may, upon first obtaining the consent of the superintendent of insurance, by vote of a majority of its directors or trustees,

amend its charter or certificate of incorporation by inserting therein any statement or matter which might have been originally inserted therein; and may also eliminate therefrom unnecessary words or verbiage, or any powers which have never been exercised or are not at the time being exercised, provided that proof of the non-exercise of powers, satisfactory to the superintendent of insurance, shall be filed in the insurance department, and, if any business has been written under the powers proposed to be eliminated, the fact that all liability incident to such powers has been fully terminated shall be shown to the satisfaction of such superintendent through an examination of such corporation or otherwise as he may require; and may likewise amend its charter or certificate of incorporation, by inserting therein or adding thereto any powers which at the time of such amendment, may have been conferred by law upon domestic insurance corporations engaged in a business of the same general character, or which might be included in the certificate of incorporation of a domestic insurance company organized under any general law of this state for a business of the same general character; and the same proceedings shall be taken upon the presentation of such amended charter or certificate adopted in relation to such amendment, to the superintendent of insurance, as are required by this chapter to be taken with respect to an original charter or certificate, except that no examination of the condition and affairs of such corporation shall be required unless so ordered by the superintendent, and if the amended charter

or certificate be approved by the superintendent of insurance, and his certificate of authority to do business thereunder is granted, the corporation shall thereafter be deemed to possess the same powers and be subject to the same liabilities as if such charter or certificates as so amended had been its original charter or certificate of incorporation, but without prejudice to any pending action or proceeding or any rights previously accrued.

3. Upon the reincorporation or upon the amendment of the charter of any life insurance corporation, having a capital stock in accordance with the provisions of this section, it may by a vote of the majority of its directors confer upon its policyholders or upon such policyholders as may have a prescribed amount of insurance upon their lives the right to vote for all or any less number of the directors in such manner not inconsistent with any provision of this chapter as may be authorized by a vote of the stockholders representing at least a majority of the capital stock at a meeting of stockholders called for the purpose. Section thirty-five of the stock corporation law shall not apply to such a corporation.

4. This section shall apply to insurance corporations organized under or subject to article six of this chapter as well as to insurance corporations organized under a special act or any general law or article two of this chapter.

5. No life insurance corporation shall hereafter be permitted to avail itself of the provisions of this section

unless it shall hold for all its outstanding policies or certificates assets equal in value to the minimum reserve required by section eighty-four of this chapter.

6. Whenever any domestic insurance corporation changes the number of its directors or increases or reduces the amount of its capital stock, pursuant to and in conformity with the provisions of the stock corporation law, it may, upon amending its charter in accordance with the provisions of this section, file in the office of the superintendent of insurance a complete copy of its charter, duly authenticated, containing the changes of its capital stock or its directors, or both, as the case may be. Such charter shall not be filed until it has attached thereto the certificate of approval of the attorney-general, as provided in section ten of this chapter.

Due service of the within Petition for Writ of Certiorari and Brief in support thereof is hereby acknowledged this.....day of March, A. D. 1938.

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Counsel for Respondents.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938

No. 21

WM. H. NEBLETT, *et al.*,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., *et al.*,

Respondents.

BRIEF OF PETITIONERS IN OPPOSITION TO THE MOTION OF RESPONDENTS FOR A DIMINUTION OF THE RECORD AND FOR CERTIORARI.

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I.

Argument.

The respondents Carroll C. Day, Harry C. Fabling, Joseph N. Gantz, Jack Paschall and Ralph J. Wetzel have suggested a *diminution* of the record and moved for *certiorari* upon the ground that the transcript of record before this court is incomplete.

What the moving parties seek to bring up is a record of subsequent proceedings in the lower court[1] which arose

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[1]The Superior Court is the court of original jurisdiction in California.

after the appeal to the Supreme Court of California had been perfected from the judgment of the lower court rendered on December 4, 1936. Th judgment of December 4, 1936, was affirmed by the Supreme Court of California[2] and is now before the Supreme Court of the United States on writ of certiorari, granted May 16, 1938.[3]

The decision of the Supreme Court of California shows that the proposed record now attempted to be brought up was not considered by that court in its decision. The suggested diminution was wholly immaterial to the Supreme Court of California's decision and is, likewise, immaterial here.

The motion for diminution shows that no part of the record now sought to be brought up came into being until after the appeal now before this court on certiorari had been perfected to the Supreme Court of California. Furthermore the entire record, before the Supreme Court of California, when it rendered its decision, is now before this court, as well as all proceedings taken by the Supreme Court of California on that record.[4] Nothing is missing from it.

The Supreme Court of California did not consider in its opinion what is now sought to be brought up on motion for certiorari.

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[2] *Carpenter v. Pacific Mutual Life Insurance Company of California,* 10 Cal. (2d) 307; R. 1509-1544.

[3] *Neblett v. Carpenter,* 82 L. Ed. Adv. Op. 1037.

[4] R. 1509-1545.

This court holds that no motion for certiorari will be granted, unless something has been omitted from the record, before the court below, and considered by it in making its decision.

> "Nor can we allow a certiorari, when it appears that nothing is omitted from the record which is of record in the court below."
>
> *City of Chicago v. Bigelow,* 7 Wallace 17.

> "An order of diminution of the record, or certiorari, will not be issued to bring up matters not of record or not considered in the court below, * * *."
>
> 4 C. J. Sec. 1613, Sec. 1135-d.

The motion and its supporting papers show that a separate appeal is pending to the Supreme Court of California on the record now sought to be brought before this court. It is not made to appear what disposition, if any, has been made of that appeal by the Supreme Court of California. Until the Supreme Court of California passes on the appeal, this court will not consider that record.[5]

The Supreme Court of the State of California is compelled by statute to take judicial notice of the records of the Supreme Court of the United States, but there is no such burden imposed on the Supreme Court of the United States to take judicial notice of the records of cases pending on appeal before the Supreme Courts of the various states and before decision by those courts. If the rule

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[5]Judicial Code §237; 28 U. S. C. A. §344.

were otherwise, there would be no point to this motion, because the Supreme Court could take judicial notice of the record without bringing it up and there would be no reason for the statutes permitting motions for diminution and for certiorari.

The record sought to be brought up, not having been considered in the decision of the Supreme Court of California, now before this court on writ of certiorari already granted, it is immaterial for all purposes here.

Petitioners pray that the motion be denied.

Respectfully submitted,

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Due service of the within Brief is hereby acknowledged this.....day of September, A. D. 1938.

_____

_____

Counsel for Respondents.

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SUPREME COURT
OF THE
UNITED STATES.

October Term, 1938

No. 21

WM. H. NEBLETT, *et al.*,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., *et al.*,

Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF.

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SUBJECT INDEX.

PAGE

Argument 2

Summary of Argument 2

Due process may be denied and contracts impaired by any one or all three branches of a state government—the legislative, the executive or administrative, and the judicial 2

Point I. All the questions presented in the petition for writ of certiorari and its supporting brief are federal 5

Point II. The procedure prescribed by the California Legislature in section 1011 of the Insurance Code, for the forfeiture of title to the Insurance Commissioner of the properties of an insurer, violates the due process clause of the federal Constitution and impairs the contracts of policyholders in a company taken over by the Commissioner. It is an unconstitutional delegation of legislative power to an administrative officer 7

Point III. It is a violation of the due process and contract clauses of the federal Constitution to delegate to a Commissioner of Insurance, or to any other state administrative officer, the right to take evidence and make findings determining the forfeiture of title in property without notice and hearings. If, under the Constitution, the power could be delegated to the Commissioner, he would have to make the determination to forfeit himself, after consideration of the evidence. He could not delegate that power to any other person or persons 10

PAGE

Point IV. The Superior Court of California never acquired jurisdiction of the subject matter, the Pacific Mutual Life Insurance Company of California, or of its policyholders. It is always a denial of due process for a court to proceed without jurisdiction and make orders affecting property rights 17

Conclusion 25

Appendix—List of Examiners 27

Appendix—Insurance Code of California, Sec. 16 28

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673	2, 4, 5, 6
Canada So. Railroad Co. v. Gebhard, 109 U. S. 527	4, 21
Carpenter v. Pacific Mutual, 10 Cal. (2d) 307	1
Doty v. Love, 295 U. S. 64	4, 21, 22
Durbrow v. Chesley, 23 Cal. App. 627	24
East Tennessee, etc. Railroad v. Southern Telephone Co., 112 U. S. 306	3, 16
Eisenberg v. Sup. Ct., 193 Cal. 575	24
Elliott v. Superior Court, 168 Cal. 727	4, 18
Fairmont Creamery Company v. Minn., 274 U. S. 1	2, 6
Fischer v. Superior Court, 110 Cal. 129	4, 18
French Bank Case, 53 Cal. 495	4, 18
Garris v. Mitchell, 7 Cal. App. (2d) 430	4, 17
Gilfillan v. Union Canal Co., 109 U. S. 401	4, 21
Home Building and Loan Association v. Blaisdell, 290 U. S. 398	3, 8
Lindsay-Strathmore Irrigation Dist. v. Superior Court, 182 Cal. 315	4, 18
Marin M. W. Dist. v. North Coast Water Co., 178 Cal. 324	4, 18
McClaughry v. Deming, 186 U. S. 49	18
Morgan v. United States (1st appeal), 298 U. S. 468; (2nd appeal), 82 L. Ed. Adv. Op. 757 (on rehearing), 82 L. Ed. Adv. Op. 1030	3, 11, 12, 13, 15, 16
Murray v. American Surety Co. of New York (C. C. A. 9), 70 Fed. 341	3, 16
Neblett v. Carpenter, 82 L. Ed. Adv. Op. 1037	1
Panama Pacific Refining Co. v. Ryan, 293 U. S. 388	3, 9
Panhandle Pipe Line Co. v. State Highway Comm., 294 U. S. 613	4, 23

PAGE

Pennoyer v. Neff, 95 U. S. 714.....4, 21
Richardson v. Superior Court, 138 Cal. App. 389.....4, 17
Schechter v. United States, 295 U. S. 495.....3, 9
Scott v. McNeal, 154 U. S. 34.....4, 21, 24
Smith v. Westerfield, 88 Cal. 374.....3, 16
Thompson v. Consolidated Gas Utilities Corp., 300 U. S. 55....4, 23

STATUTES.

Bankruptcy Act, Sec. 77B..... 22
California Code of Civil Procedure, Sec. 170..... 18
California Insurance Code, Sec. 7.....3, 14
California Insurance Code, Sec. 16.....3, 7, 8, 28
California Insurance Code, Sec. 1011.....3, 7, 8, 10, 15, 19
California Insurance Code, Secs. 1011 and 16..... 3
California Insurance Code, Sec. 1016..... 23
California Insurance Code, Sec. 1043..... 22
United States Constitution, Article I, Sec. 10..... 2

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Respondents.

PETITIONERS' SUPPLEMENTAL BRIEF.

On April 2, 1938, petitioners filed their petition and brief, praying for a writ of certiorari to review a decision of the Supreme Court of California,[1] affirming a judgment of the Superior Court[2] of Los Angeles County, which had approved a reorganization, by the Insurance Commissioner, of The Pacific Mutual Life Insurance Company of California.

Two groups of respondents filed briefs, opposing the granting of the writ. The writ was granted May 16, 1938.[3]

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[1]*Carpenter v. Pacific Mutual,* 10 Cal. (2d) 307.

[2]The Superior Court is the court of original jurisdiction in California.

[3]*Neblett v. Carpenter,* 82 L. Ed. Adv. Op. 1037.

The writ of certiorari was sought upon the grounds that due process, under the 14th Amendment to the Federal Constitution, had been denied petitioners and all other policyholders of the company in its reorganization, and that their contracts of insurance had been impaired in violation of Art. 1, Sec. 10, of the Federal Constitution.

This supplemental brief is filed for the purpose of expanding the points, made in the brief, supporting the petition for the writ, and with the desire of meeting the arguments in respondents' briefs, opposing the granting of certiorari.

ARGUMENT.

Summary of Argument.

Due Process May Be Denied and Contracts Impaired By Any One or All Three Branches of a State Government—the Legislative, the Executive or Administrative, and the Judicial.

POINT I.

All the questions presented in the petition for writ of certiorari and its supporting brief are Federal.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673; *Fairmont Creamery Company v. Minn.*, 274 U. S. 1.

POINT II.

The procedure prescribed by the California Legislature in § 1011 of the Insurance Code, for the forfeiture of title to the Insurance Commissioner of the properties of

an insurer, violates the due process clause of the Federal Constitution and impairs the contracts of policyholders in a company taken over by the Commissioner. It is an unconstitutional delegation of legislative power to an administrative officer.

California Insurance Code, Secs. 1011 and 16; *Panama Pacific Refining Co. v. Ryan,* 293 U. S. 388; *Schechter v. U. S.,* 295 U. S. 495; *Home Building & Loan Assn. v. Blaisdell,* 290 U. S. 398.

POINT III.

It is a violation of the due process and contract clauses of the Federal Constitution to delegate to a commissioner of insurance, or to any other state administrative officer, the right to take evidence and make findings determining the forfeiture of title in property without notice and hearing. If, under the Constitution, the power could be delegated to the commissioner, he would have to make the determination to forfeit himself, after consideration of the evidence. He could not delegate that power to any other person or persons.

California Insurance Code, Secs. 1011 and 7; *Morgan v. United States* (first appeal) 298 U. S. 468; (2nd appeal) 82 L. Ed. Adv. Op. 757; (on rehearing) 82 L. Ed. Adv. Op. 1030; *East Tenn. etc. Railroad Co. v. So. Telephone Co.,* 112 U. S. 306; *Murray v. American Surety Co. of N. Y.* (C. C. A. 9) 70 Fed. 341; *Smith v. Westerfield,* 88 Cal. 374.

POINT IV.

The Superior Court of California never acquired jurisdiction of the subject matter, the Pacific Mutual Life Insurance Company of California, or of its policyholders. It is always a denial of due process for a court to proceed without jurisdiction and make orders affecting property rights.

Pennoyer v. Neff, 95 U. S. 714; *Scott v. McNeal*, 154 U. S. 34; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673; *Garris v. Mitchell*, 7 Cal. App. (2d) 430; *Richardson v. Superior Court*, 138 Cal. App. 389; *French Bank Case*, 53 Cal. 495; *Elliott v. Superior Court*, 168 Cal. 727; *Fischer v. Superior Court*, 110 Cal. 129; *Lindsay-Strathmore Irrigation Dist. v. Superior Court*, 182 Cal. 315; *Marin M. W. Dist. v. North Coast Water Co.*, 178 Cal. 324; *Thompson v. Consolidated Gas Utilities Corp*, 300 U. S. 55; *Panhandle E. Pipe Line Co. v. State Highway Comm.*, 294 U. S. 613; *Gilfillan v. Union Canal Co.*, 109 U. S. 401; *Canada So. Railroad Co. v. Gebhard*, 109 U. S. 527; *Doty v. Love*, 295 U. S. 64.

POINT I.

All the Questions Presented in the Petition for Writ of Certiorari and Its Supporting Brief Are Federal.

This Court holds that the due process required by the 14th Amendment to the Federal Constitution may be denied by any one or more of the three departments of a state government.

> "The Federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government."
>
> *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673, 679.

The respondents urge that the construction of the California Insurance Code and the powers and duties of the Insurance Commissioner in administering that Code, are purely state questions. The argument ignores the principle that a state court, in exercising the right of construing a state statute, must heed the requirement of due process, guaranteed to all citizens by the 14th Amendment to the Federal Constitution.

> "Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede Land

& Improv. Co. case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 681.

A Federal question is presented when a state statute interferes with the freedom of contract.

"But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the 14th Amendment, and to declare it invalid when without substantial relation to some evil within the power of the State to suppress and a clear infringement of private rights."

Fairmont Creamery Co. v. Minnesota, 274 U. S. 1, 12.

POINT II.

The Procedure Prescribed by the California Legislature in § 1011 of the Insurance Code, for the Forfeiture of Title to the Insurance Commissioner of the Properties of an Insurer, Violates the Due Process Clause of the Federal Constitution and Impairs the Contracts of Policyholders in a Company Taken Over by the Commissioner. It Is an Unconstitutional Delegation of Legislative Power to an Administrative Officer.

All that the California Legislature requires the Commissioner to do in order to take away title to the properties of an insurance company, under § 1011 of the Insurance Code, is to file an application in the Superior Court of the county where the insurance company has its main office, showing any one of the ten acts, or conditions, enumerated in that section, to have been committed by the company, or to exist.

When the Insurance Commissioner files such an application, the Insurance Code deprives the Superior Court of all discretion. The court[4] is commanded to appoint the Commissioner, conservator of the insurer and to vest title to all of its assets and properties in him, without notice or hearing of any sort. The Commissioner, in his sworn Application in this action, alleged the existence of two of the ten conditions set up in the Code. They were that, the Commissioner had found and there was shown to exist after a report of an examination made, that the Pacific

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[4]Cal. Ins. Code, §§ 16, 1011.

Mutual Life Insurance Company of California was in a hazardous and insolvent condition.[5]

The court, immediately upon the filing of the application, observed the command of §§ 1011 and 16 of the Insurance Code, which say that: "The court *shall* issue its order vesting title to all of the assets of the insurer in the Commissioner as conservator." The word *"shall"*, whenever used in the Insurance Code, is by § 16 of the Code, made "mandatory.".[6]

The procedure prescribed by § 1011 violates all of the tenets of due process. The findings of fact upon which the order of the court *must* be made forfeiting the title in the assets of the insurer to the Insurance Commissioner are made, not only in advance of the filing of the complaint, or application before the court, but are made by the Insurance Commissioner, an administrative officer of the state, *ex parte,* and without notice.

There is no intimation in the Insurance Code of the existence of an emergency necessitating the release or delegation of the powers of the Legislature, over the business of insurance, to the Commissioner. The state courts also failed to find that any emergency existed. There was no occasion for the legislative action, such as the emergency which existed, and upon which the decision of this court, in *Home Building and Loan Association v. Blaisdell,* 290 U. S. 398, is based. In that case none of the ultimate

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[5]R. 1.

[6]Cal. Ins. Code, *infra,* p. 28.

benefits in the contracts were impaired. This court there held that, on account of an existing economic emergency, the Minnesota Legislature had made a constitutional grant of a moratorium on the foreclosure of mortgages. The Minnesota Legislature established a definite procedure which had to be taken, protecting the rights of both the mortgagor in redemption and the mortgagee in foreclosure, by declaring a moratorium against mortgage foreclosure for a prescribed period. No change was made in the ultimate promises to pay.

The release by the California Legislature to the Insurance Commissioner of the power to take evidence *ex parte* and to find the facts, upon which the court must forfeit the title of an insurer to its properties, and also to impair the contracts of the policyholders of the company, without a hearing, was an unwarranted delegation of the legislative functions to an administrative office, like that attempted to be done by the Congress to the President in the National Recovery Act, held by this court to be an unconstitutional delegation of legislative power to an executive officer. (*Panama Pacific Refining Co. v. Ryan,* 293 U. S. 388; *Schechter v. United States,* 295 U. S. 495.)

POINT III.

It Is a Violation of the Due Process and Contract Clauses of the Federal Constitution to Delegate to a Commissioner of Insurance, or to Any Other State Administrative Officer, the Right to Take Evidence and Make Findings Determining the Forfeiture of Title in Property Without Notice and Hearings. If, Under the Constitution, the Power Could Be Delegated to the Commissioner, He Would Have to Make the Determination to Forfeit Himself, After Consideration of the Evidence. He Could Not Delegate That Power to Any Other Person or Persons.

In his petition or application, under § 1011 of the California Insurance Code, upon which the whole proceeding rests, Carpenter set out that he was the Insurance Commissioner of the State of California "and for cause of action against respondent (old company) alleges, etc."[6]

After alleging his capacity to sue, the Commissioner, in paragraph IV of his application, stated his reasons or findings of fact for the action he was taking.[7]

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[6]R. 1.

[7]R. 3, paragraph IV:

"That petitioner together with a number of other insurance commissioners of states in which respondent corporation transacts its business have made a convention examination of the business and affairs of respondent corporation as of December 31, 1935, and in connection therewith petitioner and said other commissioners have joined in a report of such ex-

This court, in *Morgan v. United States* (1st, appeal) 298 U. S. 468; (2nd appeal) 82 L. Ed. Adv. Op. 757; (on rehearing) 82 L. Ed. Adv. Op. 1030, has held that, where the statutory duty is placed upon an administrative officer to determine, as a quasi-judicial officer, facts under a statute, the administrative officer, upon whom the duty is imposed, must do the determining himself. If he fails to perform his duty, recitals made by him, attempting to show the correctness of the action taken, are not binding.

> "But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion."
>
> *Morgan v. United States*, 298 U. S. 468, 477.

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amination, a certified copy of which is attached hereto, marked Exhibit 'A' and made a part hereof.

"That said examination and report shows that respondent corporation is in such condition that its further transaction of business will be hazardous to its policy holders, its creditors and to the public; that said examination and report further show that respondent corporation is insolvent within the meaning of article 13, chapter 1, part 2, division 1, of the Insurance Code of the State of California; that respondent corporation's said hazardous and insolvent condition is principally caused, among other things, by reason of the fact that respondent corporation has for a considerable number of years last past issued a large number of non-cancellable accident and health policies at a premium rate which was and is now entirely inadequate to maintain the reserves required by law to mature said policy obligations."

The wholesomeness of the announced rule of this court, regulating quasi-judicial procedures by administrative officers, could be no better illustrated than by what the Insurance Commissioner did not do, in acquiring the title to the assets of the Pacific Mutual Life Insurance Company, upon his finding that the company was in a hazardous condition and insolvent.

The contention of the respondents that the procedure taken by the Insurance Commissioner is a state question, without bearing upon the Federal questions of due process and impairment of contract "is futile. It has regard to the mere form of the proceeding and ignores realities."[8]

The realities stand out in opposition to the claim that the procedure involved a state question only, when the terms of the law are considered. The sole power of determining the facts to sustain a forfeiture of title being in the Insurance Commissioner and not in the court, the latter becomes a mere ministerial agency for the approval, by order, of the facts already found and the conclusions reached by the Commissioner.

History will show that the *Morgan* cases came in time to prevent the frittering away of constitutional liberties through decisions in quasi-judicial actions, made by persons not authorized to hear and determine such questions.

> "It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer

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[8] *Morgan v. United States*, 82 L. Ed. Adv. Op. 757, 761.

> who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."
>
> *Morgan v. United States,* 298 U. S. 468, 481.

The California Insurance Code places squarely upon the shoulders of the Insurance Commissioner, the duty of considering the evidence, from which his final conclusion of hazardous condition and insolvency of the Pacific Mutual Life Insurance Company of California was made. The importance of the duty of the Commissioner, under the Insurance Code, is greatly amplified by the mandatory provisions of the Code compelling the court, upon the filing of an application by the Commissioner showing that he has, from an examination, found one or more of the required conditions for the forfeiture of title to exist, in order to vest title in the Commissioner of all of the properties of the insurer.

The Commissioner's sworn application alleges that he, together with a number of Insurance Commissioners of other states, had made a convention examination of the old company as of December 31, 1935, and compiled a report of such examination, which was attached as Exhibit "A" to the application. The Commissioner then alleged that the report showed the company to be in a hazardous and insolvent condition. The report upon which he based his findings shows that he never saw the evidence from which his conclusions were drawn. He made the same error, as that made in the *Morgan* case, of adopting the conclusions of someone else.

His sworn application shows that he took a report made for him by seven men, five of whom were from other states than California. The Insurance Code required the findings to be made by him. That duty was imposed upon him and upon no one else. He could not delegate it, as he did, even though § 7 of the Insurance Code provides that the duties and powers imposed upon the Commissioner by the Code may be performed by a deputy.[2]

The report of examination is a letter dated July 21, 1936, addressed to the California Insurance Commissioner and to those of six other states.[3] Two of the seven signers of the letter described themselves as "Principal Examiner—State of California" and "Actuary——State of California." There is nothing in the letter to show that those two were connected with the Insurance Department of the State of California, or that they were deputies of the Insurance Commissioner. Of the seven men who signed the report, five stated that they were from other states than California.[4] It must be assumed that, since seven persons compiled the report, their final figures and conclusions,

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[2] § 7 "*Deputies, power.* Whenever, by the provisions of this code, a power is granted to a public officer or a duty imposed upon such an officer, the power may be exercised or the duty performed by a deputy of the officer or by a person authorized pursuant to law by the officer, unless it is expressly otherwise provided."

[3] R. 12; see Appendix, *infra*, p. 27.

[4] R. 32; see Appendix, *infra*, p. 28.

which the Commissioner adopted, were the result of the advice and the vote of the majority.

There is no hypothesis from which it could be reasoned that the report upon which the whole proceeding hinged for its validity, was made by the Insurance Commissioner of California, or participated in by him. The report itself shows beyond all doubt that it was made by non-residents of California over whom no one in this state had any jurisdiction or control.[5]

In the light of the opinions in the *Morgan* case, the Commissioner destroyed all jurisdiction in himself and in the court and proceeded not only without due process, but with no process at all, when he swore that the report and findings upon which he took over the company and title to its properties were made by a board of seven members over whom he had no jurisdiction, the majority, or five of whom, were from other states.

Of course, the Legislature could not make a constitutional delegation of the powers it attempted to confer upon the Commissioner, but when he, in taking over the company, went far beyond the powers attempted to be conferred, his action was void without regard to the constitutionality of § 1011.

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[5]R. 32.

Whenever it appears from an administrative officer's own statement, as it does from the Insurance Commissioner's affidavit here, that he has let someone else's judgment be substituted for his own in the performance of his quasi-judicial duties, affecting property rights, the due process clause of the Federal Constitution has been violated.[6]

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authorities. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."
>
> *Morgan v. U. S.*, 82 L. Ed. Adv. Op. 757, 762.

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[6]*Murray v. American Surety Co., New York* (C. C. A. 9) 70 Fed. 341; *Smith v. Westerfield,* 88 Cal. 374; *East Tennessee, etc. Railroad v. Southern Telephone Co.,* 112 U. S. 306.

POINT IV.

The Superior Court of California Never Acquired Jurisdiction of the Subject Matter, the Pacific Mutual Life Insurance Company of California, or of Its Policyholders. It Is Always a Denial of Due Process for a Court to Proceed Without Jurisdiction and Make Orders Affecting Property Rights.

On July 22nd, 1936, the Pacific Mutual Life Insurance Company of California was reorganized by the Commissioner and the reorganization approved by the Superior Court. All of the orders of the court made then, and between that time and August 11th, 1936, have been held void by the Supreme Court of California, on account of the disqualification of the Superior Judge who made the orders.[5]

The insurance company filed an appearance, at the same time that the Commissioner's application was filed,[6] consenting that the case be heard and determined immediately, and that the relief prayed for in the application of the Commissioner be granted. A conservator is a receiver.[7] If the appointment of the Commissioner as conservator and the vesting of title in him were not otherwise authorized,

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[5]R. 1526-1527.

[6]R. 33.

[7]*Garris v. Mitchell*, 7 Cal. App. (2d) 430; *Richardson*

and we have shown that they were not, the consent added nothing to the proceedings.[8]

The disqualification of a Judge is jurisdictional in California.[9] If a court is without jurisdiction because of the disqualification of a Judge, who sits in a case, or for any other statutory reason; or if jurisdiction has not been given by the constitution, or the law of the forum, the lack of jurisdiction cannot be cured by consent.[1]

The reorganization of the insurance company became an accomplished fact on the 22nd of July, 1936. Since that time, nothing has been done in the Superior Court but to approve the void orders, made on the 22nd of July, 1936. The Supreme Court of California held that all of the orders of the court, prior to August 11, 1936, when a qualified Judge was assigned to the case, were void,[2] but held that the orders made without jurisdiction of the court could be approved by subsequent valid orders. The jurisdiction which the Superior Court did not have is said to have been picked up and reclaimed by the order of Judge Willis on August 11th.

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[8]*French Bank* case, 53 Cal. 495; *Elliott v. Superior Court,* 168 Cal. 727; *Fischer v. Superior Court,* 110 Cal. 129.

[9]California Code of Civil Procedure, Sec. 170.

[1]*Lindsay Strathmore Irrigation Dist. v. Superior Court,* 182 Cal. 315; *McClaughry v. Deming.* 186 U. S. 49.

> "It is the universal rule that jurisdiction of the subject matter cannot be conferred upon a tribunal by consent, and it follows that the parties cannot make an effective waiver of lack of such jurisdiction."

Marin M. W. Dist. v. North Coast Water Co., 178 Cal. 324, 328.

On August 11th, the Commissioner appeared before the court and made an oral *ex parte* application for a new order, appointing him conservator and vesting in him title to the assets of the old company. The Superior Court then made an order, attempting to confirm the prior void orders and purporting to reappoint the Commissioner, conservator, and vest title of the company's assets in him.[3]

The court recites that it made the order on the application of July 22nd, 1936. That is the only application ever filed, and it is afflicted with the infirmities already pointed out.

The court made certain findings of fact in its order of August 11, attempting to cure the patent infirmities in the application. The Supreme Court of California has held on this subject of practice that the proceeding was special and that findings were not required.[4] The findings made by the court in that order but tend to accentuate the infirmities of the application. The statute says that the application must show certain things. If the application does not show those things, the court is without jurisdiction to cure them by making findings. All that the court can do, upon filing of an application by the Commissioner, under § 1011 of the Insurance Code, is to perform the ministerial duty of appointing the Commissioner, conservator, and vesting title in him, as the section commands the court to do.

The Supreme Court of California has held that the proceedings initiated July 22nd and culminating on December 4th, 1936 in the final order of the court, constitute a

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[3]R. 322-328.

[4]R. 1531.

single proceeding.[5] The final order or judgment of December 4th, 1936, approving the reorganization of the company, made the reorganization agreement effective as of July 22nd, 1936.[6] It further approved the reorganization already completed on that first day, and confirmed the transfer and conveyance of the assets of the old company executed on July 22nd, the only conveyance ever made.[7] The court thus depends for its jurisdiction upon the original application, the original conveyance of July 22nd, and the so-called contract of rehabilitation of the same date, because there are no others.

The Superior Court began without jurisdiction of either the subject matter or the policyholders. It has never acquired jurisdiction. For the court to proceed without jurisdiction was a denial of due process. Having begun without jurisdiction everything that the state courts have since done is immaterial.

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.
>
> The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject mat-

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[5]R. 1526.

[6]R. 1378.

[7]R. 1387-88.

> ter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.' *Pennoyer v. Neff*, 95 U. S. 714, 733."
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> *Scott v. McNeal*, 154 U. S. 34, 46.

In the *Scott* case this court held that the probate court denied due process in administering an estate of a man who was still alive. The decision is applicable here because that case was a proceeding in rem like the case now before this court.

The Superior Court never acquired jurisdiction of the *res* here because the application of the Commissioner was insufficient to confer jurisdiction upon the court. It never acquired jurisdiction of the policyholders because it forfeited their title without notice. (*Pennoyer v. Neff*, 95 U. S. 714, 733.)

The Supreme Court of California cites *Doty v. Love*, 295 U. S. 64, to support its holding that the reorganization of the Pacific Mutual Life Insurance Company, by dividing the policyholders into classes and treating them differently, is not an impairment of their contracts, because such treatment is authorized by implication in the Insurance Code.

It may be stated as an unqualified principle of constitutional law that creditors or others directly interested in a corporation's assets, cannot be classified, unless there is a statute permitting it, or unless their contracts authorize it.[1]

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[1] *Gilfillan v. Union Canal Co.*, 109 U. S. 401; *Canada Southern Railroad v. Gebhard*, 109 U. S. 527.

In *Doty v. Love,* the creditors of an insolvent bank were classified by the Superintendent of Banks of the State of Mississippi, and the bank reopened in pursuance of a statute providing that the Superintendent of banks, with the consent of the court, could reopen the bank, in accordance with a plan proposed by the vote of three-fourths of the creditors. That statute is not unlike section 77B of the National Bankruptcy Act, and it specifically provided for method used in the reorganization effected.

There was no authorization whatever in the California Insurance Code for the reorganization or rehabilitation of the Pacific Mutual Life Insurance Company, by the Insurance Commissioner, except that vague, uncertain and indefinite provision of § 1043 of the Insurance Code, permitting the Insurance Commissioner as conservator or liquidator, "to enter into rehabilitation agreements," after he had taken over the title to all of the assets of the company which he proposed to rehabilitate. Of course, once it is admitted that title may be taken, without due process, what follows after that doesn't matter.

The Supreme Court of California held that it was not an impairment of the obligation of contract, or a denial of due process, for the Commissioner to change all the contracts of the policyholders, classifying them and treating the classes differently, because that court held that the Commissioner was acting for the state under its police powers. The rule stated is erroneous and violates the due process clause for two reasons. It takes a common fund belonging to all creditors without statutory authority, and treats those differently who are entitled to share equally in assets, in accordance with the terms of their contracts. The decision justifies the use of one person's property for the benefit of another, which may not be done.

"And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."

Thompson v. Consolidated Gas Utilties Corp., 300 U. S. 55, 80.

"A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions."

Panhandle Pipe Line Co. v. State Highway Comm., 294 U. S. 613, 619.

In the light of this principle, the state, acting through its Insurance Commissioner, was in no better position to impair the contracts of the policyholders, or to deny them due process of law, than would have been the company itself.

Lastly, the Supreme Court of California erred when it held that policyholders who refused to assent to the plan could file their claims with a non-existent liquidator.[2] The Insurance Code makes no provision for liquidation, or for the filing of claims until a liquidator is appointed. None has ever been appointed. That the Commissioner might be appointed liquidator at some future time, if it should appear to him that his efforts as conservator were futile, is immaterial. (Cal. Ins. Code, § 1016). Constitutional rights are guaranteed; they can not be made to depend upon the contingency of the Commissioner's discretion as to the futility of his own acts.

---

[2]R. 1520.

The only conveyance of title ever made of the assets of the old company to the new, was made by Carpenter, as *liquidator*, on July 22, 1936.[3] Upon that conveyance hinges the whole reorganization, rehabilitation, or by whatever name the method used by the Insurance Commissioner, in getting the title of the assets of the old company out of it and into the new, may be called. The Insurance Commissioner was not at the time either conservator or liquidator. The orders appointing him, first, as conservator, and again, as liquidator, were void,[4] because, among other things, the Judge who sat was disqualified, and had no jurisdiction to make them. Whenever a court acts without jurisdiction, it denies due process. *(Scott v. McNeal,* 154 U. S. 34.)

The fact that the court held that the plan of rehabilitation contemplated the appointment of a liquidator is of no importance. Within the time allowed by law, this appeal was taken, depriving the Superior Court of jurisdiction to appoint a liquidator or to take any other action in the case.[5]

There was no occasion for the appointment of a liquidator. There was nothing left in the old company for him to liquidate.

It is true that the Commissioner held as trustee for the old company the stock of the new and some nebulous

---

[3]R. 183-190.

[4]R. 1526-1527.

[5]*Eisenberg v. Sup. Ct.,* 193 Cal. 575; *Durbrow v. Chesley,* 23 Cal. App. 627.

claims of rights of action against officers of the old company of highly speculative and contingent value. It is to be assumed that the Commissioner paid full value for the stock of the new company, $3,000,000, which he generously took from the cash of the old company. The probable liabilities on the policies of the old company were $700,000,000, against which the value of the capital stock of the new company, $3,000,000, would be an unimportant item. If all the policyholders dissented, $3,000,000 would satisfy less than one-half of one per cent of their claims. However, the situation is worse than this calculation makes it appear, because the rehabilitation agreement provided for the ultimate mutualization of the new company, rendering its stock worthless.[6]

CONCLUSION:

In conclusion, we claim that the public importance of this case cannot be over-estimated, because upon its decision depends the sanctity of all contracts of life, accident and health insurance in the United States, contracts in which the great majority of the people of all of the states are interested.

Life insurance is alone by far the largest of all financial businesses in the United States. The Pacific Mutual Life Insurance Company of California, 16th in size in the United States, a comparatively small company, had 300,000 policyholders, $215,000,000 in assets, and $700,000,000 in

---

[6]R. 1428.

outstanding insurance contracts. The sanctity of all contracts of insurance is involved in this proceeding. Sixty-five million life policyholders throughout the United States, who pay $6,000,000,000 a year in premiums, and who have built up $26,000,000,000 in reserves behind their $110,000,000,000 in life insurance contracts, depend for the protection of those contracts upon the decision to be made here. We pray for a reversal of the judgment.

Respectfully submitted,

WM. H. NEBLETT,

R. DEAN WARNER,

Of Los Angeles,

Attorneys for the Petitioners.

ALFRED F. MACDONALD,

ALLAN H. MCCURDY,

VERNON BETTIN,

Of Los Angeles,

Of Counsel for Petitioners.

APPENDIX.

"Los Angeles, California
July 21, 1936.

Hon. Jess G. Read
Chairman, Committee on Examinations
National Association of Insurance Commissioners
Oklahoma City, Oklahoma

Hon. Samuel L. Carpenter, Jr.
Insurance Commissioner
San Francisco, California

Hon. E. A. Conway
Secretary of State
Baton Rouge, Louisiana

Hon. Robert L. Bowen
Superintendent of Insurance
Columbus, Ohio

Hon. R. L. Daniel
Chairman, Board of Insurance Commissioners
Austin, Texas

Hon. George A. Bowles
Superintendent of Insurance
Richmond, Virginia

Hon. William A. Sullivan
Insurance Commissioner
Olympia, Washington

Sirs:

Pursuant to your direction, the undersigned examiners have made an examination of the accounts and financial condition of THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA with home office at Los Angeles, California, and are showing herewith the financial statement compiled.

FINANCIAL STATEMENT ....."

R. 12.

"..... From a survey of the above figures it is apparent that immediate action must be taken to protect policyholders.

Respectfully submitted,

R. M. MEYER,
Principal Examiner—State of California;

CARL E. HERFURT,
Actuary—State of California;

THOMAS F. BIENVENN,
Examiner—State of Louisiana;

E. E. COLTRIN,
Examiner—State of Ohio;

HOMER SANDERFORD,
Examiner—State of Texas;

C. B. COULBOURN,
Actuary—State of Virginia;

F. E. HUSTON,
Actuary—State of Washington."

R. 32.

Insurance Code of California

§ 16. "As used in this code the word "shall" is mandatory and the word "may" is permissive, unless otherwise apparent from the context."

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Due service of the within Supplemental Brief is hereby acknowledged this.....day of September, A. D. 1938.

_____

_____

Attorneys for Respondents.

FILE COPY

SEP 10 1938

CHARLES ELMORE CRO
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938
No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

Suggestion of a Diminution of Record and Motion for Writ of Certiorari; Notice; Affidavit; and Points and Authorities.

T. B. COSGROVE,
JOHN N. CRAMER,
1031 Rowan Building,
Los Angeles, California.

Counsel for Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

PAGE

Notice of Suggestion of a Diminution of Record and Motion for Writ of Certiorari 1

Suggestion of a Diminution of Record and Motion for Writ of Certiorari 3

Affidavit of John N. Cramer in Support of Suggestion of a Diminution of Record and Motion for Writ of Certiorari 9

Points and Authorities 13

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Ballard v. Searls, 130 U. S. 50	13
Butler v. Eaton, 141 U. S. 240	13
City of Los Angeles v. Abbott, 217 Cal. 184	13
Criscuolo v. Atlas Imperial Diesel Engine Co., 84 Fed. (2d) 273	14
National Fire Ins. Co. v. Thompson, 281 U. S. 331	14
Sewell v. Johnson, 165 Cal. 762	13
Rules of the Supreme Court of the United States, Rule 17	14

IN THE

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October Term, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, *et al.*,

Respondents.

Notice of Suggestion of a Diminution of Record and Motion for Writ of Certiorari.

To Petitioners Wm. H. Neblett, Vernon Bettin, William George Dickinson and Alfred F. MacDonald, and

To Wm. H. Neblett, Esq., and R. Dean Warner, Esq., Counsel for said Petitioners:

You and each of you are hereby notified that on Monday, the 3rd day of October, 1938, at the hour of 12:00 o'clock noon of said day or as soon thereafter as counsel may be heard, in the court room of the Supreme Court of the United States in the District of Columbia, the respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel will present to said

court the within Suggestion of a Diminution of Record and Motion for Writ of Certiorari and will then and there move said court to direct the issuance of a writ of certiorari to the Supreme Court of the State of California directing and commanding said court to certify the within described Supplement to Transcript of Record in the above entitled appeal, at which time and place you may be present and heard if you so desire.

Said motion will be presented on said Suggestion of a Diminution of Record and Motion for Writ of Certiorari, said Supplement to Transcript of Record and the affidavit and the points and authorities attached hereto (printed copies of which are herewith served upon you) and upon the Transcript of Record herein, the Petition for Writ of Certiorari and the briefs on file herein.

Dated: September 3, 1938.

T. B. COSGROVE,

JOHN N. CRAMER,

Counsel for Respondents Carroll C. Day; Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED F. MACDONALD,

Petitioners;

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, *et al.*,

Respondents.

Suggestion of a Diminution of Record and Motion for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel, for the purpose of correcting defects in the Transcript of Record filed herein April 2, 1938, suggest that said record is incomplete and that there is a diminution of the record in the following particulars:

On December 4, 1936, in a certain action then pending in the Superior Court of the State of California, in and

for the County of Los Angeles entitled, "Samuel L. Carpenter, Jr. v. The Pacific Mutual Life Insurance Company of California, *et al.*", said court made its ORDER APPROVING REHABILITATION AND REINSURANCE AGREEMENT. From said order petitioners herein perfected an appeal to the Supreme Court of the State of California where, on December 7, 1937, judgment was rendered affirming said ORDER. The record upon such appeal is now presented to this court for review upon Writ of Certiorari granted May 16, 1938.

On February 2, 1937, in said action entitled, *"Carpenter v. The Pacific Mutual Life Insurance Company, et al."*, said Superior Court of Los Angeles County upon petition made its ORDER FOR LIQUIDATION appointing said Samuel L. Carpenter, Jr., liquidator. Thereupon petitioners herein, and each of them, prosecuted an appeal from said ORDER FOR LIQUIDATION to said Supreme Court of California and in perfecting said appeal filed with said state Supreme Court three Transcripts on Appeal. Such appeals were numbered L. A. No. 16221, L. A. No. 16245 and L. A. No. 16246, respectively, in the files of said state Supreme Court. Said Transcripts on Appeal from said ORDER FOR LIQUIDATION were on file with the Clerk of said state Supreme Court at the time of the submission of the appeal and at the time of the rendition of judgment in the appeal prosecuted by the petitioners from the ORDER APPROVING REHABILITATION AND REINSURANCE AGREEMENT of December 4, 1936.

The ORDER FOR LIQUIDATION appointing said Samuel L. Carpenter, Jr. liquidator of said The Pacific Mutual Life Insurance Company of California is a matter intimately connected with said ORDER APPROVING REHABILITATION AND REINSURANCE AGREEMENT of said The Pacific Mutual Life Insurance Company of California. Both

of said orders were made and entered in the same case and by the same court and department thereof.

A certified copy of each of said Transcripts on Appeal from said ORDER FOR LIQUIDATION numbered L. A. No. 16221, L. A. No. 16245 and L. A. No. 16246, respectively, are submitted herewith as a Supplement to Transcript of Record in this proceeding.

For the following reasons it is essential to a proper consideration of the questions presented upon certiorari that this court have before it said Supplement to Transcript of Record herein:

1. In their Petition for Writ of Certiorari, petitioners declared:

> "It appears that no process of law was accorded one who dissented. He had no place to go. His policy was lost, because the court provided no liquidator with whom he could file his claim. The holding is probably not in accord with applicable decisions of this court herein cited, and the question is one of importance, not heretofore determined by this court." (Pet. for Cert. p. 17.)

In their brief in support of the petition, petitioners contend:

> "Having impaired the contracts of the policyholders in this manner, the plan left any policyholder who did not assent to the plan without right to file his claim with the liquidator of the old company. There was never any liquidator, consequently all of the policyholders were forced to assent to the plan, or be left with absolutely nothing. There could be no greater case of impairment of the obligation of contracts, or a denial of the equal protection of the law. The policyholders had to assent, or see their policies

lost. The court, in approving the plan, made no provision whatever for non-consenting policyholders. Giving to the policyholders who failed to assent to the plan, the right to file their claims with the non-existent liquidator was the deprivation of every due process and an impairment of contract."

(Pet. for Cert. p. 56.)

It appears from said Supplement to Transcript of Record that on February 2, 1937, said Superior Court made its ORDER FOR LIQUIDATION appointing said Samuel L. Carpenter, Jr., liquidator of said The Pacific Mutual Life Insurance Company of California, and that the petitioners and each one thereof filed notice of appeal from said order and perfected said appeal by filing in said state Supreme Court said Transcripts on Appeal hereinbefore identified and incorporated in said Supplement to Transcript of Record.

The petitioners in their appeal to the Supreme Court of the State of California did not raise the point that an order for liquidation had not been made and that said Samuel L. Carpenter, Jr. had not been appointed liquidator. This point is raised for the first time in the Petition for Writ of Certiorari to this court and in the brief in support thereof.

2. Again in their Petition for Certiorari and Brief in Support Thereof, petitioners contend that the only transfer of assets made by respondent Samuel L. Carpenter, Jr., as conservator and/or liquidator, to Pacific Mutual Life Insurance Company was by deed and bill of sale dated July 22, 1936 (Pet. for Cert. pp. 8, 9, 13, and 37).

However, it appears from said Supplement to Transcript of Record that subsequent to December 4, 1936,

and prior to January 7, 1937, respondent Carpenter, pursuant to said Agreement of Rehabilitation and Reinsurance and said Order of December 4, 1936, approving said agreement, transferred to said Pacific Mutual Life Insurance Company all the properties and assets of respondent corporation, The Pacific Mutual Life Insurance Company of California, excepting, however, certain claims against the directors of said respondent corporation and the capital stock of respondent corporation, Pacific Mutual Life Insurance Company.

3. In considering, passing upon and rendering judgment in an appeal the Supreme Court of California takes judicial notice of its records in an intimately connected case and of the facts made to appear by such records, and the facts above recited appearing in said Transcripts on Appeal, to-wit: L. A. No. 16221; L. A. No. 16245 and L. A. No. 16246, contained in said Supplement to Transcript of Record, are matters of which the Supreme Court of California takes judicial notice.

WHEREFORE, the respondents hereinabove named respectfully pray for a writ of certiorari to be directed to the Supreme Court of the State of California commanding that court to certify to this court as a part of the record in this case the Transcripts on Appeal in L. A. No. 16221—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Wm. H. Neblett, Appellant and Respondent; L. A. No. 16245—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Alfred F. MacDonald, Appellant and Respondent, and L. A. No. 16246—Samuel L. Carpenter, Jr., Insurance Commissioner of the State

of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Vernon Bettin and William George Dickinson, Appellants and Respondents, and that upon the return of said writ and record the same be and constitute a part of the record in this cause, and that it be ordered that the duly certified copy of said three Transcripts on Appeal contained in the said Supplement to Transcript of Record shall be treated as though filed in response to such writ.

Dated: September 3, 1938.

T. B. COSGROVE,
JOHN N. CRAMER,
Counsel for Respondents Carroll C. Day, Harry C. Fabliny, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

I, T. B. Cosgrove, counsel for respondents Carrol C. Day *et al.*, in the above entitled cause, do solemnly swear that the facts recited in the foregoing Suggestion and Motion are true, except such facts as are alleged upon information and belief and, as to those facts that I believe them to be true.

T. B. COVGROVE,
Counsel for Carroll C. Day, et al.

Subscribed and sworn to before me this 3rd day of September, 1938.

(Seal) MARY IVES ANDERSON,
Notary Public in and for the County of Los Angeles, State of California.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, *et al.*,

Respondents.

Affidavit of John N. Cramer in Support of Suggestion of a Diminution of Record and Motion for Writ of Certiorari.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

JOHN N. CRAMER, being first duly sworn, deposes and says:

Affiant is one of counsel of record for respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

Affiant has examined the files of the Superior Court of Los Angeles County in the office of the Clerk thereof at

Los Angeles, California, in that certain proceeding therein entitled, "Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner v. The Pacific Mutual Life Insurance Company of California, *et al.*, Respondents", and numbered 404673 in the files of said Superior Court, in which proceeding an order entitled ORDER APPROVING REHABILITATION AND REINSURANCE AGREEMENT was made December 4, 1936, which order was affirmed by the Supreme Court of California on December 7, 1937, and is here under review upon certiorari.

It appears from said files in said Superior Court that on February 2, 1937, said Superior Court (the Honorable Henry M. Willis, Judge presiding) gave its order entitled ORDER FOR LIQUIDATION, wherein it appointed said Samuel L. Carpenter, Jr., liquidator of respondent herein The Pacific Mutual Life Insurance Company of California. It further appears from said original records that the petitioners herein, on the dates hereinafter set forth, filed their respective notices (or amended notice) of appeal to the Supreme Court of the State of California from said ORDER FOR LIQUIDATION made by said Superior Court on February 2, 1937, to-wit:

Name of Petitioner Herein	Date of Filing Notice of Appeal
Wm. H. Neblett	February 5, 1937
Vernon Bettin and William George Dickinson	February 25, 1937
Alfred F. MacDonald (Amended Notice of Appeal)	February 26, 1937

Affiant has examined the original Transcripts on Appeal filed in the office of the Clerk of the Supreme Court of the State of California in petitioners' said appeals, which are numbered and entitled as follows: L. A. No. 16221—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Wm. H. Neblett, Appellant and Respondent; L. A. No. 16245—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Alfred F. MacDonald, Appellant and Respondent, and L. A. No. 16246—Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, Petitioner and Respondent v. The Pacific Mutual Life Insurance Company of California, a corporation, *et al.*, Respondents, Vernon Bettin and William George Dickinson, Appellants and Respondents. It appears from said original Transcripts on Appeal that the same were filed with the Clerk of said Supreme Court as follows:

Number of Cause	Name of Appellant	Date of Filing
L. A. No. 16221	Wm. H. Neblett	February 16, 1937
L. A. No. 16245	Alfred F. MacDonald	March 3, 1937
L. A. No. 16246	Vernon Bettin and William George Dickinson	March 3, 1937

A true copy of each of said Transcripts on Appeal (omitting, however, endorsements and affidavits of service on each transcript, but including endorsements of filing) is contained in the Supplement to Transcript of Record submitted with, and referred to, in the foregoing Suggestion of a Diminution of Record and Motion for Writ of Certiorari.

JOHN N. CRAMER,

Subscribed and sworn to before me this 3rd day of September, 1938.

(Seal) MARY IVES ANDERSON,
Notary Public in and for the County of Los Angeles, State of California.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938
No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, *et al.*,

Respondents.

Points and Authorities.

The Supreme Court of California takes judicial notice of matters appearing in its files in intimately connected cases, particularly where such matters occurred after the order or judgment under review.

Sewell v. Johnson, 165 Cal. 762, 770-775;

City of Los Angeles v. Abbott, 217 Cal. 184, 192.

The Supreme Court of California in this regard follows decisions of the Supreme Court of the United States to the same effect.

Ballard v. Searls, 130 U. S. 50;

Butler v. Eaton, 141 U. S. 240, 242.

And see:

National Fire Ins. Co. v. Thompson, 281 U. S. 331, 336, and cases cited.

This cause being before this court on writ of certiorari to the Supreme Court of California, this court will take judicial notice of all matters of which the Supreme Court of California takes judicial notice.

Criscuolo v. Atlas Imperial Diesel Engine Co., 84 F. (2d) 273, 275.

The suggestion of a diminution of record and motion for certiorari is the proper method to bring these matters to the attention of this court.

Rule 17, Rules of the Supreme Court of the United States.

Respectfully submitted,

T. B. COSGROVE,

JOHN N. CRAMER,

Counsel for Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.



Due service of the within Suggestion of a Diminution of Record and Motion for Certiorari, Notice, Affidavit and Points and Authorities is hereby acknowledged this.....day of ....., 1938.

_____

_____

Counsel for Petitioners.

FILE COPY

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 19[illegible]

No. [illegible] 21

WM. H. NORBERT, VERNON BETTIS, WILLIAM GROVER DICKINSON and ALDEN F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

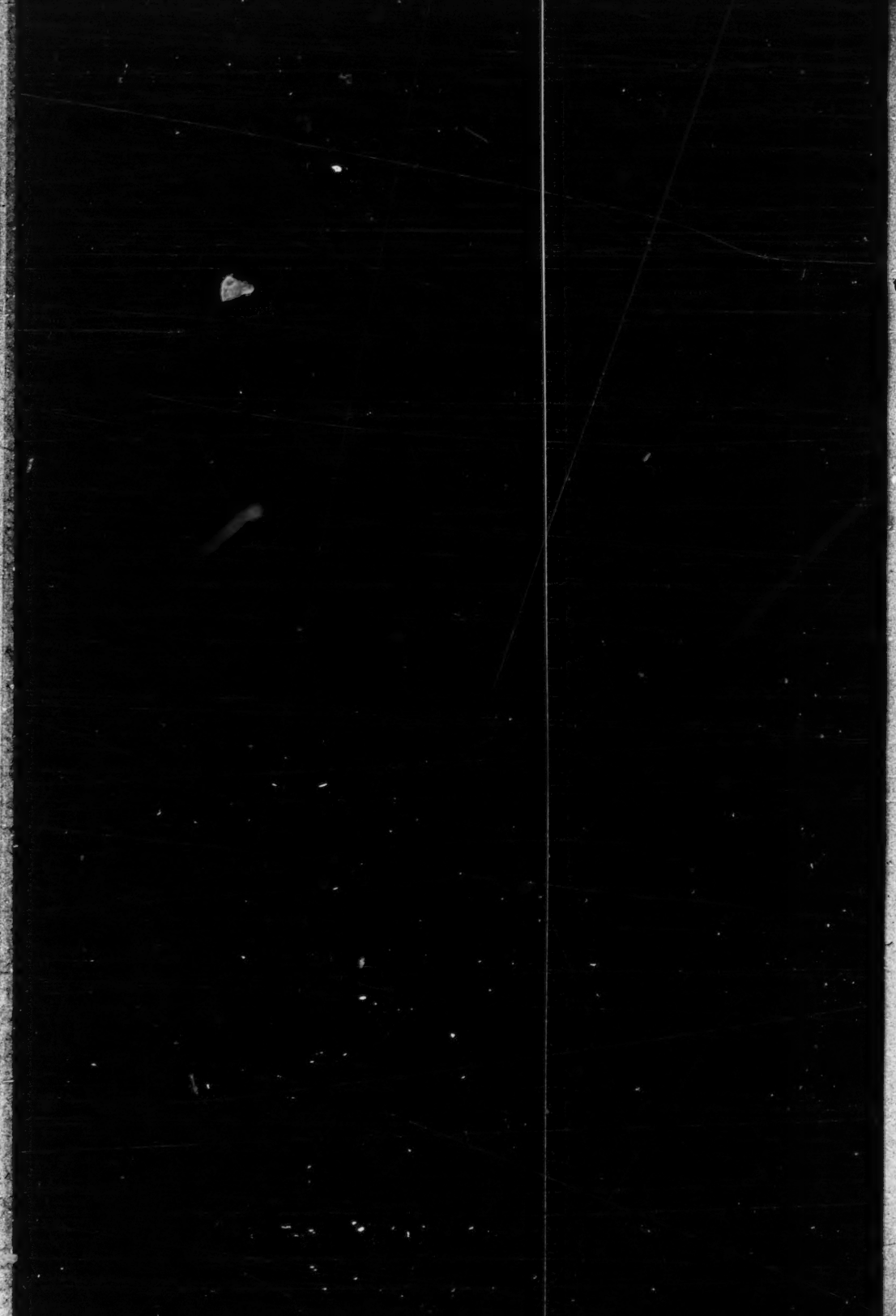
Respondents.

Brief of Respondent Insurance Commissioner in Opposition to Granting of Certiorari.

U. S. WEBB,
Attorney General of the
State of California,
State Building, San Francisco, Cal.,
Attorney for Respondent Insurance Commissioner.

Of Counsel:
HUNTER WEBB,
SHEPARD MITCHELL,
JOHN L. NOURSE,
PERRY PRICE.

Parker & Baird Company, Law Printers, Los Angeles.



SUBJECT INDEX.

PAGE

I.

Opinions Below 3

II.

Jurisdiction 4

III.

Statement of Case 6

IV.

Argument 17

Preliminary statement 17

Summary of argument 19

Reply to Specification No. 1 21

The state court obtained jurisdiction upon the filing of the Commissioner's application 21

Reply to Specification No. 2 25

Title was vested in the Commissioner as conservator by valid order, and passed to the new company by valid authorization 25

Reply to Specification No. 3 30

The statute is sufficiently definite to afford due process 30

Reply to Specification No. 4 35

No question of due process is raised by the Commissioner's use of the new company 35

Reply to Specification No. 5 37

A. The order approving the agreement was a valid order 37

B. The obligations of petitioner's contracts were not improperly impaired 38

C. No substantial impairment exists in fact 44

Conclusion 47

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98	26
Anniston Mfg. Co. v. Davis, 301 U. S. 337, 81 L. Ed. 1143, 57 S. Ct. 816	32
Bourjois, Inc. v. Chapman, 301 U. S. 183, 81 L. Ed. 1027, 57 S. Ct. 691	26
Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160, 54 S. Ct. 615	47
Clary v. Hoagland, 6 Cal. 685	22
Cline v. Frink Dairy Co., 274 U. S. 445, 71 L. Ed. 1146, 47 S. Ct. 681	31
Comstock v. Lomex (Tex. Civ. App.), 135 S. W. 185	26
Connally v. General Const. Co., 269 U. S. 385, 70 L. Ed. 322, 46 S. Ct. 126	30, 31
De Bearn v. Safe Deposit & T. Co., 233 U. S. 24, 58 L. Ed. 833, 34 S. Ct. 584	23
DeCou v. Howell, 190 Cal. 741, 214 Pac. 444	4
Doty v. Love, 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558	20, 33, 40, 41
Farmers & Merchants Bank v. Federal Reserve Bank, 262 U. S. 643, 67 L. Ed. 1157, 43 S. Ct. 651	42
Finkler, Estate of, 7 Cal. (2d) 97, 59 Pac. (2d) 801	4
Gasquet v. Lapeyre, 242 U. S. 367, 61 L. Ed. 367, 37 S. Ct. 165	23
German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 58 L. Ed. 1011, 34 S. Ct. 612	40
Gibbs v. Zimmerman, 290 U. S. 326, 78 L. Ed. 342, 54 S. Ct. 140	41
Harris v. Seidell, 1 Cal. App. (2d) 410, 36 Pac. (2d) 1104	22
Hentschel v. Fidelity & Deposit Co. of Maryland (C. C. A. 8th), 87 Fed. (2d) 833	36
Hodgson v. Vermont. 168 U. S. 262, 42 L. Ed. 461, 18 S. Ct. 80	42

PAGE

Lemieux v. Young, 211 U. S. 489, 53 L. Ed. 295, 29 S. Ct. 174 42

Levezey v. Gorgas (Pa. 1799), 4 Dall. 71, 1 L. Ed. 746 36

Manigault v. Springs, 199 U. S. 473, 50 L. Ed. 274, 26 S. Ct. 127 42

McDonald v. Oregon Navigation Co., 233 U. S. 665, 58 L. Ed. 1145, 34 S. Ct. 772 23

Mitchell v. Taylor, 3 Cal. (2d) 217, 43 Pac. (2d) 803 47

Moore Ice Cream Co. v. Rose, 289 U. S. 373, 77 L. Ed. 1265, 53 S. Ct. 620 26

Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. Ed. 685, 37 S. Ct. 260 42

Mulcahy v. Baldwin, 216 Cal. 517, 15 Pac. (2d) 738 45

National Surety Corp. v. Nantz, 262 Ky. 413, 90 S. W. (2d) 385 41

National Surety Co., Re, 239 App. Div. 473, 268 N. Y. S. 88 (aff'd 264 N. Y. 743, 191 N. E. 521) 41

O'Gorman & Young v. Hartford Fire Insurance Co., 282 U. S. 251, 75 L. Ed. 324, 51 S. Ct. 130 40

Palache v. Pacific Insurance Company, 42 Cal. 418 41

Pedrodena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787 8

Penn General Casualty Co. v. Pennsylvania ex rel. Schnader, 294 U. S. 189, 79 L. Ed. 850, 55 S. Ct. 386 ..... 41, 47

Pennsylvania v. Williams, 294 U. S. 176, 79 L. Ed. 841, 55 S. Ct. 380 ..... 41, 47

Producers' Transp. Co. v. Railroad, 176 Cal. 499, 169 Pac. 59 (aff'd 251 U. S. 228, 64 L. Ed. 239, 40 S. Ct. 131) 42

Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 78 L. Ed. 1025, 54 S. Ct. 542 32

Rawlins v. Georgia, 201 U. S. 638, 50 L. Ed. 899, 26 S. Ct. 560 34

PAGE

Schechter Corp. v. United States, 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837 35

Scrimsher v. Reliance Rock Co., 1 Cal. App. (2d) 382, 36 Pac. (2d) 688 22

Small Co. v. American Sugar Refining Co., 267 U. S. 233, 69 L. Ed. 589, 45 S. Ct. 295 31

Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566, 14 A. L. R. 1054 31

Standard Oil Co. v. Missouri ex inf. Hadley, 224 U. S. 270, 56 L. Ed. 760, 32 Sup. Ct. 406 ..... 22, 23

State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 132 Pac. 755, L. R. A. 1915E 675 (aff'd 238 U. S. 611, 59 L. Ed. 1488, 35 S. Ct. 792) 28, 41, 42

Stephenson v. Binford, 287 U. S. 251, 77 L. Ed. 288, 53 S. Ct. 181 42

Union Dry Goods Co. v. Georgia P. S. Corp., 248 U. S. 372, 63 L. Ed. 309, 39 S. Ct. 117 42

United States v. Shreveport Grain & El. Co., 287 U. S. 77, 77 L. Ed. 175, 53 S. Ct. 42 32

Walker v. Wilkinson (C. C. A. 5th), 3 Fed. (2d) 867 26

Younger v. McCoy (Tex. Civ. App.), 53 S. W. (2d) 165 26

STATUTES.

California Insurance Code, Sec. 1011 ..... 7, 24, 41

California Insurance Code, Sec. 1016 ..... 41, 42

California Insurance Code, Sec. 1037 (d) 29

California Insurance Code, Sec. 1043 ..... 10, 41

Judicial Code, Sec. 237 (b) (U. S. C. Title 28, Sec. 344 (b)) 4

Supreme Court Rule 38 (5) (a) 4

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937.

No. 921.

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED F. MACDONALD,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

Brief of Respondent Insurance Commissioner in Opposition to Granting of Certiorari.

I.

Opinions Below.

The opinion of the Supreme Court of California is not yet officially reported. It appears in the advance opinions of that court, *"California Decisions,"* vol. 94, page 681; and in 74 Pac. (2d) 761. It is printed in the record.[1]

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[1]R. pp. 1509-1544.

An oral opinion of the trial court is also printed in the record,[2] but under the California Practice is no proper part thereof.[3]

II.

Jurisdiction.

Jurisdiction of this court is sought to be invoked under section 237(b) of the Judicial Code (U. S. C. Tit. 28, sec. 344(b)). It is conceded that some of the points urged by petitioners involve rights asserted under the Constitution of the United States, and are thus within the jurisdiction of this court.

Petitioners seek review on the ground that the state court has decided Federal questions of substance not heretofore determined in this court; and that it has decided other Federal questions of substance in a way probably not in accord with applicable decisions of this court.[4]

This respondent contends that no Federal questions of substance have been raised. We conceive that only two Federal questions are raised in the Petition at all; that both are insubstantial; and that the decision of the state

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[2]R. pp. 1469-1506.

[3]R. p. 1530. See also *Estate of Finkler* (1936) 7 Cal. (2d) 97, 59 Pac. (2d) 801, 803; *DeCou v. Howell* (1923), 190 Cal. 741, 751, 214 Pac. 444.

[4]See Supreme Court Rule 38(5)(a).

courts thereon was in accord, and not in conflict, with applicable decisions of this court. All other questions attempted to be raised are in our opinion purely questions of state law.

Petitioners have stated their points three times[5] in somewhat different order and in somewhat different language. We conceive it to be most convenient to this court to furnish a brief statement of facts before analyzing the petitioners' contentions.

A full and accurate statement of facts is furnished in the opinion of the State Supreme Court.[6] For the convenience of this court, we append a brief statement of facts, eliminating matters which do not appear to be material on this petition.

In making our statements of facts, we have been unable to follow that of petitioners, which contains many statements of what we believe to be immaterial matters, and many statements which we believe to be in conflict with, or not supported by, the record. We have, however, attempted to point out in footnotes most of the matters on which we take issue with their statement.

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[5]Petn. pp. 12-22, 28, 29-32.

[6]R. pp. 1518-1526, 1528-1529.

III.

Statement of Case.

The order of the trial court approved the execution of a certain Rehabilitation and Reinsurance Agreement. It was from that order, and that order alone, that the appeal to the State Supreme Court was prosecuted.

The State Supreme Court affirmed the order appealed from.[7]

The Insurance Code of the State of California provides a comprehensive statutory scheme for the handling by the Insurance Commissioner of insolvent insurance companies.[8]

On July 22, 1936, The Pacific Mutual Life Insurance Company of California (usually for convenience referred to in the proceedings below and herein as "Old Company") was insolvent, and in such condition that its fur-

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[7]In affirming that order the State Supreme Court was under the necessity of determining whether a valid order appointing the Insurance Commissioner as Conservator of The Pacific Mutual Life Insurance Company of California had been made. It held that one order to that effect was void; but further held that a subsequent order to the same effect was valid, and constitutes a sufficient basis on which to predicate the proceedings. We take issue with petitioners' statement that the State Supreme Court affirmed "a series of void orders." (Petn. p. 4.) The error in that statement will be later developed in this brief.

[8]Important provisions are set out in Petition, App. pp. 59-64. A brief summary appears at R. pp. 1533-1534.

ther transaction of business would be hazardous to its policy holders, its creditors, and the public.[9] On that date the Insurance Commissioner, acting under section 1011 of that Code,[10] filed his application[11] in the appropriate court[12] praying that he be appointed Conservator of the Old Company.

Promptly after the filing of that application, Judge Douglas L. Edmonds, then a judge of the Superior Court, made his order in terms appointing the Commissioner as Conservator, and vesting in him title to the assets of the Old Company.[13]

Judge Edmonds thereafter made further orders, directing the liquidation of the Old Company [R. pp. 49-52] and approving a "Rehabilitation, Sale and Transfer of Assets, and Reinsurance Plan and Agreement."[14] Both of said orders were void[15] and were apparently so treated by the Superior Court in its later proceedings,[16] although

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[9]R. p. 1386.

[10]Petition App. pp. 59-60.

[11]R. pp. 1-32.

[12]Superior Court, being the lower court of general jurisdiction in California.

[13]R. pp. 34-38.

[14]R. pp. 103-107. This is the so-called "reorganization" referred to at the top of Petition, p. 5. It was abandoned, never reached the State Supreme Court, and is not in issue here.

[15]R. pp. 1526-1527.

[16]See R. pp. 1378-1395; esp. 1389.

the record does not show their vacation.[17] They were not relied upon below, are not relied upon here, and may be entirely disregarded.

Twenty days after the original order appointing Conservator, Judge Edmonds pointed out that he was the holder of a $5000 life policy in the Old Company.[18] Under the California law, as declared by the Supreme Court of that state in this proceeding, that fact made his orders in the premises void.[19] Immediately upon that disclosure being made, on August 11, 1936, the original application for appointment as Conservator was presented to Judge Henry M. Willis, another Judge of said court; who heard it and considered it[20] and thereupon made his

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[17]Because of the nature of the record we are unable to demonstrate the vacation of these orders. Such vacation would be by minute order, which would be no part of a "Judgment Roll." *Pedrorena v. Hotchkiss* (1892), 95 Cal. 636, 638, 30 Pac. 787, 788. But clearly the State Supreme Court does not, as petitioners assert (Petition, p. 10), affirm these void orders. It expressly says they are void. [R. p. 1526.]

[18]R. p. 323.

[19]R. pp. 1526-1527.

[20]R. p. 323. Petitioners say that the application was the only evidence before the trial court (Petition, pp. 13, 35). The record does not show what evidence was taken at that time. The order does recite that the court "reheard" the matter, and was fully advised [R. p. 323]. Since petitioners elected to appeal on a judgment roll, we are unable to show by reference to the record the character and amount of evidence taken.

own order appointing the Commissioner as Conservator and vesting title to the assets of the Old Company in him as such.[21] This order also contained language of ratification of the original order appointing Conservator; but the effect of that language need not be decided. *The independent order of appointment made by Judge Willis stands by itself, and is alone a sufficient foundation upon which to predicate the order appealed from.*

In order to carry on the business of the Old Company, and to preserve its good will, going concern value, and agency organization, the Commissioner had caused to be organized a corporation, Pacific Mutual Life Insurance Company (throughout the proceedings and herein usually referred to as "New Company"), through the agency and instrumentality of which he continued to conduct the

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[21]R. pp. 322-328, esp. 325; pp. 1521-1522; 1527. Petitioners persist, in this court as in the state courts, in failing to make candid disclosure of the terms of the order made by Judge Willis. (Petition, pp. 10, 39, 43) (But see Petition, pp. 13, 43.) Its nature is clearly disclosed in the record, and in the opinion of the State Supreme Court, at the points above cited.

business.[22] His action in this respect was approved by the trial court,[23] and by the Supreme Court of the state.[24]

Section 1043 of the California Insurance Code provides that the Commissioner, either as conservator or liquidator, may, subject to the approval of the court, reinsure the business of the insolvent or enter into rehabilitation agreements.[25] Acting under that section, the Commissioner proposed a Rehabilitation and Reinsurance

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[22]R. pp. 850-851; pp. 1528-1529; p. 1535. It is not true that the New Company, during any period covered by the record, functioned as an entity "discharged from all supervision of the Commissioner except the general supervision which he exercises over all insurance companies in this state." (Petition, p. 10.) Petitioners have not brought up the evidence in that regard; but the record does show [R. pp. 850, 1387, 1388] that the Commissioner held all of its stock; and the record shows that *he* conducted the business through the agency and instrumentality of the Company. [R. p. 851.] The precise extent of the control he exercised does not, however, appear in the record, which omits all of the evidence.

[23]R. pp. 1378-1395, esp. 1387-1388, 1395.

[24]R. pp. 1528-1529.

[25]Petition App. p. 64. Petitioners persist (Petition, pp. 5, 49 *et passim*) in distinguishing between "reorganization" and "rehabilitation." The nature of that distinction is not explained. In any event, the State Supreme Court has held that what was done in this case was "Rehabilitation" within the meaning of the statute.

Agreement on September 25, 1936.[26] An order to show cause was issued by Judge Willis, returnable October 19, 1936;[27] and notice of the hearing was given by publication, posting, and service upon numerous counsel appearing, as well as by mailing to all policy holders and stockholders.[28]

The proposed Rehabilitation and Reinsurance Agreement provided for the transfer to the New Company of all of the assets then held by the Conservator, except stock of the New Company and certain asserted claims.[29] The New Company agreed to reinsure and assume all policy claims and liabilities other than liabilities under the so-called "Non-Can Policies."[30] The New Company also agreed to reinsure and assume a specified percentage

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[26]R. pp. 846-904. The "Rehabilitation, Sale and Transfer of Assets, and Reinsurance Agreement", approved by the void order of Judge Edmonds and subsequently abandoned, is not "the whole plan of reorganization" (Petition, pp. 8, 9). On the contrary, it is no part of the plan approved by the Superior Court in the order appealed from, and passed upon by the State Supreme Court.

[27]R. pp. 909-913. The order to show cause did not refer to any ratification of prior orders, nor to making any order *nunc pro tunc*. (See Petition, pp. 10, 44.) It did have to do with the ratification of certain *acts* of the Commissioner. This point will be later developed.

[28]R. pp. 909-913; 1383-1384; 1524.

[29]R. pp. 859-860.

[30]R. pp. 862-865.

of the obligations under the Non-Can Policies;[31] and to restore further benefits and possibly full benefits from certain designated sources of income of the New Company.[32] Proceeds of the assets retained by the Commissioner (*i. e.*, stock of the New Company and asserted claims against officers of the Old Company) were also made available in part for such restoration.[33] The agreement contemplated the appointment of a liquidator, and the payment of claims filed with him from the remaining proceeds of the retained assets[34] and, if any further moneys prove necessary, from certain moneys payable to him by the New Company.[35] Policy holders were not required to accept the proffered reinsurance; but could if they preferred reject the benefit of the agreement and proceed against the estate of the insolvent in accordance with ordinary forms of law.[36] It is to be noted that the

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[31]R. pp. 873-876.

[32]R. pp. 877-879.

[33]R. pp. 885-888.

[34]R. pp. 885-888.

[35]R. pp. 882-885.

[36]R. pp. 900-902; 1525-1526. It is therefore not correct to state (as the petition expressly does at page 56, and impliedly does at page 15) that a new obligor is substituted without the consent of the policy holder. Nor is the contract of the holder of a "non-can" policy altered or attempted to be altered except in so far as he may consent thereto, although the petition here is largely founded upon such a supposed alteration. (See Petition, pp. 15, 28(5); 32; 54; 55-56.)

interests of stockholders of the Old Company are completely subordinated to those of its creditors and policy holders. They are entitled to no participation until full restoration of the benefits provided by the policies of consenting non-can policy holders in amounts as originally written by the Old Company; and all claims and expenses of the Conservator and Liquidator (including, of course, claims of non-consenting policy holders) have been fully paid.[37]

The foregoing outline presents the most important features of the agreement, so far as it seems material here.[38]

Petitioners, in their objections to the approval of the proposed agreement, asserted in general language, (a) that the proposed agreement was an unconstitutional exercise of the power of the Insurance Commissioner; and (b) that all of the laws under which he was acting were unconstitutional.[39] Other points raised by them in their objections relate to questions of fact and questions of state law.

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[37]R. pp. 1396-1444, *passim;* esp. p. 1435.

[38]The complete agreement is attached to the order of the Superior Court, R. pp. 1396-1444. A summary is in the opinion of the State Supreme Court, R. pp. 1525-1526.

[39]R. pp. 993-994; 1235-1236; 1275; See also R. pp. 250-251; 628-629; 684-685.

The trial court approved the agreement and authorized its execution.[40] In detailed recitals the trial court found that the Old Company had been insolvent and in a hazardous condition;[41] that the properties were more valuable in a going concern than in separate parcels, and that the intangibles were worth several million dollars which would be preserved by the agreement;[42] that the plan embodied in the agreement was feasible, fair, just, and equitable, and afforded a feasible method of providing full restoration in a reasonable time;[43] and that all persons interested were afforded reasonable opportunity to participate in the plan.[44] The Commissioner was authorized to execute the agreement, and to convey the properties to the New Company.[45] The record presented does not include the evidence, and in any event stops with the entry of the order (which is the order under review); and obviously

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[40]R. pp. 1383-1395. The order did not ratify or confirm any of the earlier orders. Petitioners' statement that it did (Petition, p. 11) refers to a portion of the order ratifying *acts of the Commissioner*. This new order, and not any of the earlier orders (as petitioners indicate at pp. 11 and 40 of their petition) is the basis of the rehabilitation.

[41]R. p. 1386.

[42]R. p. 1386.

[43]R. pp. 1386-1387.

[44]R. p. 1387.

[45]R. p. 1388.

no conveyance made pursuant to that order would appear in the record.[46]

Petitioners assert that the trial court held that it was powerless to control or guide the action of the Commissioner. This is not a correct statement of the holding of the trial court, and is not supported by petitioners' reference to the record.[47] The trial court asserted the right to pass upon, and did pass upon, the question of whether the plan was unfair, unreasonable, or arbitrary.[48]

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[46]Petitioners repeatedly assert (Petition, pp. 9, 13, 37, 52-53) that no conveyance was ever made except that of July 22, 1936. They fail to show how that fact, if true, has injured them. The appeal is from an order authorizing a conveyance to be made. In the nature of things, the record does not show what has happened since the making of the order; and therefore does not show whether it has been complied with. If any presumption is to be indulged, however, it is that the order has been complied with and the new conveyance made. Petitioners assert (Petition, p. 12) that the State Court held that title vested in the New Company on July 22d. As we read the opinion, the court holds that the ratification of that conveyance was valid; but does not indicate whether the ratification relates back to July 22d, or to August 11th (by which date, as we will show, the Commissioner certainly had title); or whether it relates back at all. The point is immaterial on this appeal, as we will show hereafter.

[47]R. p. 1501. We have already (note 2 and text) observed that the opinion is not properly a part of the record.

[48]R. pp. 1501, 1544.

The order of approval was filed December 4, 1936, and entered December 7, 1936.[49] It does not, however, purport to be entered *nunc pro tunc*, as petitioners suggest.[50] The agreement, by its terms, became effective as of July 22, 1936; that is to say, liabilities were assumed as they had existed on that day. It is, of course, common business practice, in transferring a going business, to make the contracts with relation thereto effective on a day certain, and usually on a past day.

Appeals to the State Supreme Court by these petitioners resulted in the affirmance of the order;[51] and this petition follows.

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[49]R. p. 1444.

[50]Petition, p. 11.

[51]R. pp. 1509-1545. The Supreme Court affirmed the order appealed from and necessarily thereby held the order of August 11, 1936, appointing conservator to be valid. It held the orders of Judge Edmonds to be void. It did not (as petitioners say in their petition, page 15) hold that all of the orders made in consummation of the reorganization were absolutely void.

IV.

ARGUMENT.

Preliminary Statement.

Petitioners specify five errors.[52] All are worded as Federal questions; but it is a short and sufficient answer to the first four specifications, so far as this petition is concerned, that no Federal questions appear to have been raised in or decided by either of the courts below. It is a further answer to specifications 1, 2, and 4 that

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[52]Petition, p. 28. We deem it unnecessary to answer mere generalities, not specified as errors, of the nature appearing on pages 19 and 20 of the petition. It seems obvious from the record, for example, that both Commissioner [R. pp. 851, 852] and court [R. pp. 1378-1395] felt that the proposed plan was the best possible plan for the policyholders. Certainly petitioner Neblett's proposal for immediate liquidation [R. pp. 1347-1349] would destroy the very insurance which he concedes on those pages it is important to preserve. The implicit charges of misconduct and bad faith are fully answered by the opinion of the State Supreme Court [R. p. 1517]. Whether use of the word "mutual" in the names of the companies is proper is also a question of evidence and of state policy, decided by the state courts [R. p. 1544]. Nor is the suggestion that the Insurance Commissioner becomes an unrestrained dictator (Petition, pp. 20, 45) borne out by the record, which shows a court approval after many weeks of hearing; followed by a full review in the State Supreme Court.

the questions involved are fundamentally questions of state law; and the claim that they involve any constitutional rights is so entirely nebulous as to raise no shadow of a Federal question. The attempt to bring the alleged error complained of in specification 3 within the meaning of the 14th Amendment is also rather fanciful, and would involve an extension of that Amendment far beyond any limits this court has heretofore suggested.

Specification 5 does involve a Federal question which was raised in and decided by the state courts; but the point therein involved has been so completely established in accordance with that decision by decisions of this court, that the Federal question no longer remains substantial.

Respondent Insurance Commissioner, however, deems it his duty to point out, although briefly, that the questions of state law involved in the first four specifications were correctly decided; and that the constitutional questions attempted to be asserted therein would have been wholly without substance, even if they had been properly raised.

SUMMARY OF ARGUMENT.

Respondent Insurance Commissioner contends:

With respect to Petitioners' First Specification of Error:

The state court obtained jurisdiction upon the filing of the Commissioner's application.

1. Even if it did not, the point was not raised below.

2. And the implied decision of the state courts that they had jurisdiction involves only a question of state law, not reviewable here.

3. The application in any event sufficiently complied with the statute.

With respect to Petitioners' Second Specification of Error:

Title was vested in the Commissioner by valid order, and passed to the New Company by valid authorization.

1. Whether the attempted ratification of the first (void) order was effective is not involved on this appeal, and was not decided below.

2. The order of Judge Willis contains an express appointment, sufficient to vest title in the Commissioner.

3. The effect of the order of Judge Willis is a question of state law.

4. The order appealed from authorizes a conveyance. Whether the New Company received title before that order is immaterial.

5. Whether an unauthorized conveyance can be ratified; and, if so, whether title relates back, are both questions of state law.

With respect to Petitioners' Third Specification of Error:

The statute is sufficiently definite to afford due process.

1. The question was not raised below.

2. The statute did not forbid or require action by petitioners; and they are not compelled to construe it, or to act under it before it is construed.

With respect to Petitioners' Fourth Specification of Error:

No question of due process is raised by the Commissioner's use of the New Company.

1. The right of the Commissioner to delegate his powers is a question of state law.

With respect to Petitioners' Fifth Specification of Error:

A. The order approving the agreement was a valid order.

B. The obligations of petitioners' contracts were not improperly impaired.

1. The case is controlled by *Doty v. Love*, 295 U. S. 64.

2. The state police power permits the regulation of financial institutions, including insurance companies; and contractual rights must yield to that power. That the state action here taken was reasonable and fair has been found by the state courts, and petitioners do not challenge that finding, or point to any instance of unreasonableness. *This proposition is so well established that the Federal question it raises is no longer substantial.*

C. There was no substantial impairment in fact.

1. Petitioners were not required to accept reinsurance; they could, at their option, retain all of their rights against the Old Company. Therefore the contracts were not impaired at all.

2. That they might not be paid in full (if true) would be a consequence of insolvency, and not of any action of the state.

3. The point that a liquidator had not been appointed was not raised below; but in any event an order of liquidation is not necessary, and if it were, it must be presumed that such an order has been made.

REPLY TO SPECIFICATION No. 1.

(Petitioners' Brief, Point A.)

The State Court Obtained Jurisdiction Upon the Filing of the Commissioner's Application.

Petitioners assert that the original application did not show that the company, having been insolvent by $17,500,000 on December 31, 1935,[53] was still insolvent or in a hazardous condition seven months later on July 22, 1936. They then assert that this alleged defect prevented jurisdiction from attaching in the trial court. They then con-

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[53]R. pp. 26, 31; Petition, p. 7.

clude that it is a denial of due process of law to permit titles to be affected by order of a court which has not obtained jurisdiction.

The constitutional question was not raised in or passed upon by either of the courts below. The state courts held that they did not obtain jurisdiction. That holding is implicit in the very fact that they took and exercised jurisdiction throughout the proceeding.[54] Moreover, the opinion of the Supreme Court expressly states that the application was sufficient.[55]

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[54]*Standard Oil Co. v. Missouri ex inf. Hadley* (1912), 224 U. S. 270, 280-281, 56 L. ed. 760, 767, 32 Sup. Ct. 406, 408, 409.

This has been the settled rule and practice in California throughout its history: "The first point decided by any court, although it may not be in terms, is, that the court has jurisdiction, otherwise it would not proceed to determine of the rights of the parties. For the purposes of the first trial in this court, the jurisdiction was as much determined as though the point had been made and passed upon." *Clary v. Hoagland* (1856), 6 Cal. 685, 688. Accord: *Scrimsher v. Reliance Rock Co.* (1934) 1 Cal. App. (2d) 382, 393, 36 Pac. (2d) 688, 692; *Harris v. Seidell* (1934), 1 Cal. App. (2d) 410, 417, 36 Pac. (2d) 1104, 1107.

[55]R. p. 1528: "The petition for appointment as conservator, containing proper allegations, was filed July 22nd."

The sufficiency of the petition to invoke the jurisdiction of the court is obviously a question of state law.[56] This court has repeatedly held that the jurisdiction of the state courts is a question for the state courts to decide.[57]

Moreover, the State Supreme Court was obviously right in its decision. The statute permits the order upon the filing of an application showing that the insurance

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[56]"It is of course essential to the validity of any judgment that the court rendering it should have jurisdiction not only of the parties but of the subject matter . . . . But it is equally well settled that it is for the Supreme Court of the state finally to determine its own jurisdiction and that of other local tribunals, since the decision involves a construction of the laws of the state by which the court was organized . . . . Its decision and judgment necessarily imply that under that clause of the Constitution it had jurisdiction of the subject-matter and authority to enter judgment of ouster and fine in civil *quo warranto* proceedings. That ruling is conclusive upon us, whether the judgment is civil or criminal or both combined." *Standard Oil Co. v. Missouri ex rel. Hadley* (1912), 224 U. S. 270, 280-281; 56 L. ed. 760, 767; 32 S. Ct. 406, 409.

[57]*McDonald v. Oregon Navigation Co.* (1914), 233 U. S. 665, 669-670; 58 L. ed. 1145, 1148-1149; 34 S. Ct. 772, 773. *Gasquet v. Lapeyre* (1916), 242 U. S. 367, 369; 61 L. ed. 367, 370; 37 S. Ct. 165, 166. *Standard Oil Co. v. Missouri ex rel. Hadley* (1912), 224 U. S. 270, 280-281; 56 L. ed. 760, 767; 32 S. Ct. 406, 409. *De Bearn v Safe Deposit & T. Co.* (1914), 233 U. S. 24, 33-34; 58 L. ed. 833, 836-837; 34 S. Ct. 584, 587.

company "is found, after an examination, to be in such condition that its further transaction of business will be hazardous . . ."[58] The application alleges that the Commissioner (with others) made an examination; and that "said examination . . . shows that respondent corporation *is* in such condition that its further transaction of business will be hazardous . . ."[59] (Italics ours.) The allegation is obviously sufficient.

A second justification for the assumption of jurisdiction appears later in the same statute. If the application is "accompanied by a certified copy of the Commissioner's last report of examination . . . showing such (insurance company) to be insolvent . . .", the order is likewise directed to issue. The application here was accompanied by a certified copy of a report of examination dated the day before the filing of the application.[60] It is to be noted that this portion of the statute does not use the words "to exist" (upon which pages 35 and 36 of the petition so insist).

The application affirmatively states that the examination shows that the company "is" (*i.e.*, at the date of the application) insolvent.[61] Again, the allegation is obviously sufficient.

Specification No. 1 affords no reason for the issuance of a writ of certiorari.

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[58]Cal. Insurance Code, §1011 (d); Petn. p. 60.

[59]R. p. 3.

[60]R. pp. 11-32, esp. p. 12.

[61]R. p. 3.

REPLY TO SPECIFICATION No. 2.

(Petitioners' Brief, Points B, C, D, and E.)

Title Was Vested in the Commissioner as Conservator By Valid Order, and Passed to the New Company by Valid Authorization.

Petitioners claim that they were denied due process by a holding that the title was vested in the Commissioner by a void order.[62]

But no such decision appears to have been made below.

In fact, no question of title was involved in the lower courts. It was necessary to decide whether the Commissioner had been validly appointed as Conservator prior to the submission of the Rehabilitation and Reinsurance Agreement, since under state law it is only after a conservatorship has been appointed that such an agreement can be approved. But as we have already shown, the order made by Judge Willis on August 11th constitutes an

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[62]We note petitioners' claim that Commissioner and the Old and New Companies asserted that the disqualification of Judge Edmonds was waived, and that the Supreme Court of the State tacitly so held. (Petn. p. 38.) If it had, it might well have been a mere matter of state law. But the fact is that no such claim appears upon the record or has been or is made. The State Supreme Court clearly did not so hold, but on the contrary held Judge Edmonds' orders to be void. [R. p. 1526.]

independent appointment, and hence a sufficient basis for the subsequent proceedings.[63]

The contention of petitioners that Judge Willis' order had nothing to operate upon, since all of the assets of the Old Company had been theretofore conveyed away,[64] is predicated upon a verbal quibble as to the "assets" referred to. The Old Company had its original assets if the conveyance was void; it had a right to set aside the

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[63]The State Supreme Court points out that the order of August 11th contained both an independent order and a ratification of the earlier order of Judge Edmonds. It has been held that even a void order can be ratified, and that the ratification may relate back to the date of the original order. (*Younger v. McCoy* (Tex. Civ. App. 1932), 53 S. W. (2d) 165, 166. See also: *Comstock v. Lomex* (Tex. Civ. App. 1911), 135 S. W. 185, 186. *Walker v. Wilkinson* (C. C. A. 5th (1925)), 3 Fed. (2d) 867, 869.) Due process requires only one hearing and even a hearing after judgment would suffice. (*Moore Ice Cream Co. v. Rose* (1933), 289 U. S. 373, 384; 77 L. ed. 1265, 1273; 53 S. Ct. 620, 624. *American Surety Co. v. Baldwin* (1932), 287 U. S. 156, 168; 77 L. ed. 231, 239; 53 S. Ct. 98, 102. *Bourjois, Inc., v. Chapman* (1937), 301 U. S. 183, 188-189; 81 L. ed. 1027, 1032; 57 S. Ct. 691, 695.) It therefore seems obvious that no substantial question of due process arose, even if, as Petitioners assert, the State Court held that the original order was ratified. But the date upon which the Commissioner received technical legal title is not involved in this appeal; and, as we read the opinion of the State Supreme Court, was therefore not decided below.

[64]Petn. pp. 43-44.

conveyance if the conveyance was voidable; and it had the proceeds of the conveyance if the conveyance was valid. Whatever it had was an asset of the Old Company to which the Commissioner succeeded by virtue of the order of August 11th.

It is equally obvious that the original assets of the Old Company[65] have reached or will reach the New Company. The order appealed from authorizes a new conveyance to that company.[66] Presumptively it was made or will be made after the entry of the order (and hence beyond the scope of the record on this proceeding.)[67]

If the conveyance of July 22 was void, the assets have passed or will pass to the New Company by the conveyance authorized by the order appealed from; if the original conveyance was voidable, the right to set it aside is surrendered by the new conveyance; and if the original conveyance was valid, the New Company merely retains its title, confirmed by a new deed.

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[65]Disregarding, of course, such changes in assets as were incident to the operation of the business by the Commissioner through the instrumentality of the New Company.

[66]R. pp. 1388-1389.

[67]Petitioners repeatedly assert that the conveyance of July 22 was the only conveyance. (Petn. pp. 9, 13, 37, 52-53.) But it is surely a novel doctrine that an order authorizing a conveyance should be reversed because the record does not show that it has yet been made. If it had not, it could yet be made when all means of reviewing the order were exhausted.

It follows that even if the original conveyance was improperly made, the same property must pass to the New Company pursuant to the order of December 4th. Petitioners do not suggest that the administration during the period from July 22 to December 4 was inefficiently conducted. A setting aside of the conveyance of July 22 would result in nothing other than an immediate reconveyance pursuant to the order of December 4. It seems obvious that the manner in which the business was operated while the litigation was pending, and the technical state of the title during that period, are wholly immaterial on this appeal; and that petitioners are not injured by the conveyance of July 22nd.

But any confusion petitioners may assert with respect to the title to the properties is not born of the opinion of the state court. That court held that the state statute authorizes summary seizure of the properties of an insolvent insurance company by the Insurance Commissioner.[88] Such a statute, it is thoroughly established, is not a violation of constitutional guaranties.[89] The court then held that after such seizure the Commissioner had the power for the preservation of the business to transfer assets to the New Company in order to preserve going concern

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[88]R. pp. 1527-1528.

[89]*State Savings & Commercial Bank v. Anderson* (1913), 165 Cal. 437; 132 Pac. 755; L. R. A. 1915E 675; affirmed (1915), 238 U. S. 611; 59 L. ed. 1488; 35 S. Ct. 792.

values.[70] It held that ratification of such acts (as distinguished from ratification of the void orders pursuant to which they were done[71]) was sufficient under state law.[72]

Surely, these are all questions of state law. And as surely, there is nothing surprising in a holding that ratification is the equivalent of a prior authorization. Certainly it is not a violation of due process for the state to adopt so elementary a principle of law.

No Federal question is raised by Specification No. 2.

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[70]R. pp. 1528-1529. Petitioners say (Petn. p. 51) that the Supreme Court of the State held that this power flowed from section 1037 (d) of the Insurance Code. But no record reference supports their assertion. Perhaps that section was in the mind of the court, but we fail to find that it so stated in its opinion.

[71]Petitioners assert that the void orders were ratified. (Petn. p. 39; see also pp. 10, 11, 15, 43, 44.) The record shows only one attempt to ratify any of Judge Edmonds' orders—and that is the order appointing Conservator. [R. p. 325.] All of his other orders were completely abandoned. There was, however, ratification of certain *acts* which had been done by the Commissioner. [R. pp. 1387, 1388.] It is quite common to ratify acts of officers, receivers, or agents, whether or not they have been done pursuant to a prior void authorization. If one acting under a forged power of attorney attempts to convey X's property, surely X can ratify the transaction; even though the forgery of the power of attorney was a criminal act.

[72]R. p. 1529: "We find no irregularity or illegality in this phase of the transaction."

REPLY TO SPECIFICATION No. 3.
(Petitioner's Brief, Points G and H.)

The Statute is Sufficiently Definite to Afford Due Process.

Petitioners assert that the statute is so uncertain in its meaning that its enforcement denies them due process of law. Petitioners argued below that the agreement approved was not a "Rehabilitation" or a "Reinsurance" agreement. The trial court and the Supreme Court of the state held that it was both. But it does not appear that prior to this petition it has been suggested that such a holding involved any constitutional question. Indeed, it appears that Petitioner Neblett has conceded in the state court the constitutionality of the statute, at least for himself.[73]

Nor is any substantial constitutional question involved. Petitioners refer to the well established rule that a statute which forbids or requires the doing of an action in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[74] But

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[73]R. p. 1532, 20 lines from end of page.

[74]*Connally v. General Const. Co.* (1926), 269 U. S. 385, 391; 70 L. Ed. 322, 328; 46 S. Ct. 126, 127. Petnrs. Brief, pp. 49-50.

the statute here involved neither *forbids* nor *requires* petitioners to act. The cases cited by petitioners are all cases in which the person complaining has been required, at his peril, to interpret a vague statute; and to interpret it correctly at the risk of losing his liberty or property.[75] But here petitioners were not required to interpret the statute at all. The statute was a mere grant of power to state officers and courts. Such grants are habitually made in general terms. Interpretation of the statute is a problem for the state court. Until it has made its determination that the particular agreement is within the grant of power, petitioners are not called upon to make any election. After it has done so, the uncertainty no longer exists. In this situation there is no denial of due

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[75] *Connally v. General Const. Co.* (1926), 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126, 127; *Cline v. Frink Dairy Co.* (1927), 274 U. S. 445, 457-464, 71 L. Ed. 1146, 1152-1155, 47 S. Ct. 681, 685-687; *Small Co. v. American Sugar Refining Co.* (1925), 267 U. S. 233, 238-239, 69 L. Ed. 589, 593, 45 S. Ct. 295, 297; *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.* (1921), 231 N. Y. 51, 131 N. E. 566, 14 A. L. R. 1054, 1056.

process.[76] Clearly it cannot be the law that every state statute which requires construction is by that very fact unconstitutional.

Petitioners' Point G,[77] apparently directed at the same specification of error, clearly raises no Federal question. It is merely an assertion that the California court improperly construed its statute, and that under California law no incidental powers can be implied thereunder. The short answer is that the California Supreme Court has

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[76]"These considerations also dispose of the contention that Sec. 902 'is so vague and uncertain that it is meaningless, and therefore affords no remedy.' It was not necessary for the Congress in insisting that a claimant should not recover where it appeared that he had not borne the burden of the tax, to attempt to formulate the conclusions which would be appropriate upon varying states of fact. Petitioner's argument, drawn from the writings of economists, is itself sufficient to show the futility of such an effort. The Congress could, and did, lay down a general principle and leave its application to the facts as they would appear in particular instances in a proceeding adapted to their full disclosure. The general principle thus laid down is no more vague and indefinite than the equitable doctrine which governs the right of recovery in actions for money had and received." *Anniston Mfg. Co. v. Davis* (1937), 301 U. S. 337, 353, 81 L. Ed. 1143, 1154, 57 S. Ct. 816; see also: *Puget Sound Power & Light Co. v. Seattle* (1934), 291 U. S. 619, 626-627, 78 L. Ed. 1025, 1031, 54 S. Ct. 542, 546; *United States v. Shreveport Grain & El. Co.* (1932), 287 U. S. 77, 82, 77 L. Ed. 175, 178, 53 S. Ct. 42, 44.

[77]Petnrs. Brief pp. 48-49.

held that the statute authorized this very agreement; and that holding is conclusive here.[78] It serves no useful purpose to analyze the distinction between implied power and incidental powers. Again the decision of the state courts that the powers here exercised were proper is conclusive of the issue.

Doty v. Love,[79] upon which this respondent will place reliance in discussing petitioners' fifth specification of

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[78]Petitioners further argue that the state court misconstrued the New York cases (Petn. pp. 48, 49), and therefore erroneously construed the California statute. If they did, it is still merely a question of state law. That the state court proceeded on an illogical or erroneous basis in interpreting its statute raises no federal question. But it should be observed that the New York cases cited by the state court obviously and definitely were *not* decided under section 52 of the New York act, as even a cursory examination of the statute and the cases will demonstrate. [See R. p. 1537.] It may also be noted that under the New York law the term "rehabilitator" is used where the California statute uses the term "conservator." The language of the New York cases referred to by petitioners (Petn. p. 48) as indicating that "rehabilitation" implies the continuance of the old company, are referring to what the California statute calls "conservation." New York cases of "rehabilitation" involving the formation of a new company and the abandonment of the old are referred to in the opinion of the State Supreme Court. [R. pp. 1535-1537.]

[79]*Doty v. Love* (1935), 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558.

error, is sought to be distinguished by pointing out that the Mississippi statute there involved is much more detailed than the California statute here applied.[80] This attempted distinction fails because it is based upon the misconception of the scope of the Fourteenth Amendment underlying all of petitioners' Point "G." The California statute has been construed by its state courts; and the only question here is whether the state could constitutionally authorize the course taken if the statute had been express and detailed.[81]

Specification No. 3 raises no substantial Federal question.

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[80]Petn. pp. 50-51.

[81]"At the argument before us the not uncommon misconception seemed to prevail that the requirement of due process of law took up the special provisions of the State Constitution and laws into the 14th Amendment for the purposes of the case, so that this court would revise the decision of the state court that the local provisions had been complied with. This is a mistake. If the State Constitution and laws as construed by the state court are consistent with the 14th Amendment, we can go no further. The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its Constitution in express terms." *Rawlins v. Georgia* (1905), 201 U. S. 638, 639-640, 50 L. Ed. 899, 900, 26 S. Ct. 560, 561.

REPLY TO SPECIFICATION No. 4.

(Petitioner's Brief, Point F.)

No Question of Due Process is Raised by the Commissioner's Use of the New Company.

Petitioners assert that the Commissioner delegated his powers to the New Company; and that such action is in violation of their constitutional rights. They challenged the use of the New Company in the state courts, as a matter of state law, and those courts held it proper.[82] But no constitutional question in this regard appears to have been asserted prior to this petition.

It is a short answer that the use of the New Company as a corporate agency for conducting the business prior to the approval of the Rehabilitation and Reinsurance Agreement did not affect any of petitioners' rights.

But in any event, the question is purely one of state law. A reading of petitioners' brief [83] discloses that the objection is based on two California statutes of 1915. Clearly their interpretation and reconciliation with the Insurance Code of 1935 is a question of state law.

The authorities cited are not at all in point. The *Schechter* case[84] relates to the delegation of legislative

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[82]R. pp. 1528-1529, 1535, 1537, 1387-1388.

[83]Petnrs. Brief pp. 46-47.

[84]*Schechter Corp. v. United States* (1935), 295 U. S. 495, 79 L. Ed. 1570, 55 S. Ct. 837.

powers to the executive branch of the government; and is based on the doctrine of separation of powers of the Federal government. The *Hentschel* case[85] held that the judgment of the state court, acting with the consent of the Insurance Commissioner, appointing one other than the Commissioner as trustee of an insurance company in dissolution, was binding on other courts. The court is manifestly applying state law. The language quoted by petitioners[86] is not the holding of the Circuit Court of Appeals, but is that court's summary of a holding of the Missouri Supreme Court which had been cited to it. It is, again, a statement of state law. The *Levezey*[87] case is again a state court decision, establishing its own law. Although reported in Dallas, it is a decision of the High Court of Erorrs and Appeals of Pennsylvania. The holding is merely that under Pennsylvania law, a referee cannot delegate his authority.

We do not concede that there was any delegation of authority in the instant case. The Commissioner merely made use of a corporate agency through which he did business. But the propriety of his action, by whatever name it be called, was clearly a question of state law, and the State Supreme Court has conclusively held it proper.

No Federal question is raised by Specification No. 4.

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[85]*Hentschel v. Fidelity & Deposit Co. of Maryland* (1937) (C. C. A. 8th), 87 Fed. (2d) 833, 838-839.

[86]Petnrs. Brief p. 47.

[87]*Levezey v. Gorgas.* (Pa. 1799), 4 Dall. 71, 74-75, 1 L. Ed. 746, 748.

REPLY TO SPECIFICATION No. 5.
(Petitioner's Brief, Point J.)

A. The Order Approving the Agreement Was a Valid Order.

Petitioners' Specification of Error No. 5[88] includes the statement that the orders were void. That portion of the specification has been fully treated in the foregoing portion of this brief. It is necessary only to repeat that the only two orders necessary to sustain the agreement were those of August 11, 1936[89] appointing Conservator; and of December 4, 1936[90] approving the agreement. No reliance upon any orders of Judge Edmonds is required.

It should perhaps be pointed out that the order of December 4th does not refer to the earlier order of Judge Edmonds approving the earlier (and abandoned) plan; that order was conceded to be invalid. The agreement and the order approving it stand on their own feet. The agreement is not the same as that approved by Judge Edmonds; the two differ in various respects.[91]

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[88]Petnrs. Brief p. 28.

[89]R. pp. 322-328.

[90]R. pp. 1378-1444.

[91]Compare, for example, R. pp. 124-125, 131-132 with R. pp. 877-879.

B. The Obligations of Petitioner's Contracts Were Not Improperly Impaired.

Petitioners contend that the Rehabilitation and Reinsurance Agreement in its operation impairs the obligation of their contracts.

One of the petitioners complains that a new insurer has been substituted without his consent for the insolvent company with which he contracted[92] while the remaining petitioners object that the terms of their contracts have been changed in that they are required to take reduced protection.[93] The record shows that while benefits on certain policies are temporarily reduced provision is made for the ultimate restoration of benefits out of profits of the business of the New Company and other sources;[94] and that all of the assets are held for the benefit of the creditors.[95] Petitioners claim that no Liquidator has been

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[92]Petn. p. 15; Petnrs. Brief p. 56.

[93]Petn. p. 15; Petnrs. Brief p. 55.

[94]R. pp. 1416-1419; 1425-1427; 1525.

[95]R. pp. 1396-1444, passim; esp. 1425-1427, 1525-1526.

appointed, and hence that they are afforded no effective alternative to the acceptance of the agreement.[96]

Even if petitioners' contentions were correct no substantial Federal question would be raised.

The action of the Insurance Commissioner and the state court was clearly within the limits of the reserved power

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[96]Petn. pp. 16, 17; Petrs. Brief p. 56. It should be observed that petitioners, on this point, quote from the opinion of the California Supreme Court. (Petn. p. 16.) Their first quotation is from that court's summary of the abandoned plan, and not the plan approved. When discussing the approved plan, the court further points out that "The plan also provides that the Commissioner, either as conservator or liquidator, shall continue to hold all the stock of the new company as a protection to all old company policy holders." [R. p. 1526.] In the absence of the evidence, it must be presumed that the evidence introduced in the trial court demonstrated that such assets (together with other assets held by the Commissioner) would be sufficient protection to the policy holders. It must also be presumed that the court and Commissioner have performed their duty, and that a liquidation order has been made. Petitioners' second quotation (Petn. p. 16) is obviously a statement of a legal proposition, and not of a feature of the approved agreement. All a dissenter is entitled to receive as a matter of law, says the court, is what he would have received had there been a complete liquidation. The court then proceeds to point out [R. p. 1539] that the approved agreement presumptively gives him that much or more.

of the state. In *Doty v. Love*[97] this court upheld a plan for the rehabilitation of a bank against similar objections. In that case the rehabilitation was compulsory and it involved the substitution of a new party for the insolvent contracting party. Moreover, creditors were not assured of full payment but were compelled to rely upon the success of the future operations of a new company for the collection of the greater portion of their claims. Nothing further was done in the instant case so far as petitioners' contentions are concerned.

The power of the state to terminate contracts of banks and insurance companies through liquidation has never been seriously questioned. In *Doty v. Love* this court merely applied fundamental principles of constitutional law in reaching its conclusion that the state likewise had the power to modify such contracts through rehabilitation. And the case at bar is a mere application of the same principle.

The business of insurance is a business which is affected with a public interest.[98]

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[97]*Doty v. Love* (1935), 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558.

[98]*German Alliance Ins. Co. v. Kansas* (1913), 233 U. S. 389, 414, 58 L. Ed. 1011, 1023, 34 S. Ct. 612, 620; *O'Gorman & Young v. Hartford Fire Insurance Co.* (1930), 282 U. S. 251, 257-258, 75 L. Ed. 324, 327-328, 51 S. Ct. 130, 131-132.

The public interest extends to the preservation of an insurance company and the conservation of its assets when the safety of the institution is in jeopardy.[99] The extremity of windup and termination of the corporate business is to be avoided if possible.[100]

A creditor of an insolvent bank does not have a vested right to a liquidation at the hands of a state official and the rehabilitation of insolvent financial institutions may be proper.[101]

The Legislature of the State of California, through the enactment of sections 1011, 1016, and 1043 of the Insurance Code[102] impliedly demands that an effort be made to rehabilitate the business of an insolvent insurance company if rehabilitation can be accomplished. Only when it appears to him that it would be futile to continue to act

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[99]Compare: *Doty v. Love* (1935), 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558; *State Savings & Commercial Bank v. Anderson* (1913), 165 Cal. 437, 132 Pac. 755, L. R. A. 1915E 675 (affirmed (1915), 238 U. S. 611, 59 L. Ed. 1488, 35 S. Ct. 792). See, also: *Pennsylvania v. Williams* (1935), 294 U. S. 176, 79 L. Ed. 841, 55 S. Ct. 380; *Penn General Casualty Co. v. Pennsylvania ex rel. Schnader* (1935), 294 U. S. 189, 79 L. Ed. 850, 55 S. Ct. 386.

[100]*Palache v. Pacific Insurance Company* (1871), 42 Cal. 418, 432-434; *Re National Surety Co.* (1934), 239 App. Div. 473, 268 N. Y. S. 88 (affirmed (1934), 264 N. Y. 743, 191 N. E. 521); *National Surety Corp. v. Nantz* (1936), 262 Ky. 413, 90 S. W. (2d) 385.

[101]*Doty v. Love* (1935), 295 U. S. 64, 79 L. Ed. 1303, 55 S. Ct. 558; *Gibbs v. Zimmerman* (1933), 290 U. S. 326, 78 L. Ed. 342, 54 S. Ct. 140.

[102]Petn. Appendix pp. 59, 60, 62, 64.

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a Conservator may be apply for an order of liquidation under 1016. Furthermore, the California Supreme Court has held in this case that rehabilitation is to be preferred to liquidation.[103]

The exercise of the reserved power of the state to protect the comfort and general welfare of the people is paramount to the rights of individuals arising out of contracts and private rights are continually forced to yield to the demands of public necessity.[104]

The exercise of the state's power is qualified only by the requirement that the state action be reasonably related to the public interest and not arbitrary, unreasonable or oppressive.[105]

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[103]R. pp. 1534-1535.

[104]*Manigault v. Springs* (1905), 199 U. S. 473, 480-481, 50 L. Ed. 274, 278-279, 26 S. Ct. 127, 130-131; *Union Dry Goods Co. v. Georgia P. S. Corp.* (1919), 248 U. S. 372, 63 L. Ed. 309, 39 S. Ct. 117; *Stephenson v. Binford* (1932), 287 U. S. 251, 77 L. Ed. 288, 53 S. Ct. 181; *Producers' Transp. Co. v. Railroad* (1917), 176 Cal. 499, 169 Pac. 59 (affirmed (1920), 251 U. S. 228, 64 L. Ed. 239, 40 S. Ct. 131).

[105]*State Savings & Commercial Bank v. Anderson* (1913), 165 Cal. 437, 446-447, 132 Pac. 755, 758-759 (affirmed (1915), 238 U. S. 611, 59 L. Ed. 1488, 35 S. Ct. 792); *Lemieux v. Young* (1908), 211 U. S. 489, 495-496, 53 L. Ed. 295, 300, 29 S. Ct. 174, 176; *Hodgson v. Vermont* (1897), 168 U. S. 262, 272-273, 42 L. Ed. 461, 464, 18 S. Ct. 80, 83; *Mountain Timber Co. v. Washington* (1917), 243 U. S. 219, 237-238, 61 L. Ed. 685, 696, 37 S. Ct. 260, 264-265. See, also: *Farmers & Merchants Bank v. Federal Reserve Bank* (1923), 262 U. S. 643, 661, 67 L. Ed. 1157, 1164, 43 S. Ct. 651, 656.

The trial court has found (presumably on ample evidence) and the State Supreme Court has held that the action of the Insurance Commissioner was reasonable, and that the Rehabilitation Agreement itself was reasonabl.[106] In its order dated December 4, 1936 the trial court recites "that said rehabilitation and reinsurance agreement and the plan embodied therein, and each of them, is fair, just and equitable."[107]

The decision of the State Supreme Court is in full accord with the many decisions of this court holding that the state under its reserved powers may regulate insurance companies and their business; and that if private contracts hamper the exercise of that power they must yield to it as long as the exercise of the power is not arbitrary, unreasonable or oppressive.

The further constitutional point based upon the difference in the treatment accorded by the plan to the holders of life and non-can policies, is not raised by petitioners in either their petition or their brief. Had it been so raised, it would be thoroughly disposed of by the trial court's finding of a lack of unfair discrimination:[108] and by the reasoning of the State Supreme Court in completely demonstrating that adequate and sufficient reasons for the difference in treatment must be assumed, upon the record, to exist.[109]

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[106]R. pp. 1385 (par. 4), 1386 (pars. 6, 7), 1387 (pars. 8, 9). R. pp. 1538-1540.

[107]R. p. 1387.

[108]R. p. 1385.

[109]R. pp. 1538-1541; esp. 1540.

C. No Substantial Impairment Exists in Fact.

There is a further and complete answer to petitioners' contentions that the obligations of their contracts are improperly impaired. The preceding discussion has assumed that petitioners have, as they suggest, been compelled by state action to accept an alteration of their contracts. But this is not the fact. The policyholders of the insolvent company were not required to accept the New Company as a reinsurer or to suffer any change in the terms of their policies. They were entitled to reject the offer of reinsurance.[110]

It is obviously the law of California that liquidation may follow the approval of the Rehabilitation Agreement. That such procedure was contemplated is obvious throughout the proceedings.[111] Obviously, the appointment of a liquidator, which is intended to follow the approval of the agreement, would not appear in this record. When petitioners state[112] that no liquidator has been appointed they go beyond the record. We do not feel entitled to leave the record to assert the contrary; but we do not wish our silence to be taken as a concession of the truth of petitioners' statement. We do point out, moreover, that the point

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[110]R. pp. 1440-1441, 1538.

[111]R. pp. 1389, 1398, 1421-1424, 1425-1427, 1428, 1433-1437, 1440, 1441. Opinion of the State Supreme Court, R. p. 1525.

[112]Petn. p. 17; Petnrs. Brief p. 56.

was not raised in the State Supreme Court; and we are therefore unable to appeal to the facts that court judicially knew in this connection. In any event, it must be presumed that the court and the Commissioner performed their proper functions and that a Liquidator has been or will be appointed in due course.

A policy holder who has accepted the benefits of the Rehabilitation Agreement has thereby waived any right to object to the constitutionality of the agreement or the procedure through which it was authorized.[113]

On the other hand, a policy holder who dissents is given the right to file his claim for the full amount warranted by his policy as originally written and to have it allowed and paid in the contemplated liquidation proceeding. His contract is not altered. Nor is his right an empty right. The Rehabilitation Agreement provides for the payment of certain moneys to the Liquidator, who also holds the stock of the New Company and other assets for the protection of the policyholders.[114] If such claims are not paid in full that eventuality is not the result of action by the state, but is the result of the insolvency of the Old Company. In the absence of evidence, however, it can be presumed that the Liquidator will receive sufficient money to pay the claims of creditors in full; and it certainly

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[113]*Mulcahy v. Baldwin* (1932), 216 Cal. 517, 526, 15 Pac. (2d) 738, 741.

[114]R. pp. 1421-1424, 1425-1428.

cannot be presumed that the dissenter would have received a greater amount if the state, bound by tradition, had liquidated the entire business.[115]

The right of the state, through its officers, to take possession of the assets of an insolvent insurance company and regulate its liquidation is not challenged by peti-

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[115]R. pp. 1397, 1421-1424; R. p. 1539: "Appellant Bettin urges that his remedy against the old company is ineffective because that company has conveyed all its assets of value to the new company. The record shows the contrary. It discloses that as trustee for all creditors of the old company, including dissenters, the commissioner holds all of the stock of the new company, the agreement of the new company to pay him certain sums equivalent to the reserves established on policies whose owners dissent, and the agreement of the new company to pay over to him for the benefit of all creditors of the old company portions of its future earnings. There is nothing in the judgment roll to indicate the value of these assets. The record is also silent as to what the policyholders would have received in liquidation. All that the judgment roll discloses is that under the approved plan the assets are far in excess of what they would be on liquidation. On these appeals, without the evidence before us, in support of the judgment, we must assume that evidence was introduced on these vital points, and that such evidence demonstrated that dissenters under the plan will receive as much, or more, as they would have received on liquidation. The order appealed from contains a recital that adequate provision is made in the plan for each class of policyholder. We must assume that such recital was amply supported by evidence."

tioners. Indeed, it is too well established to be subject to question.[116] And unless petitioners voluntarily consent to the plan, the only impairment they suffer is that concededly lawful impairment of remedy incident to any state liquidation proceeding.

Conclusion.

Respondent Insurance Commissioner submits that no case for certiorari has been made out. All of petitioners' complaints, save two, are purely questions of state law. The two points which may involve Federal questions are susceptible of the following brief answers:

The point (not raised below) that the statute is so vague as to deprive them of their constitutional rights rests upon a misapplication of the principle that a statute forbidding or requiring an act must be sufficiently certain that those who must act under it may reasonably understand their duties. It is obvious that the mere fact

---

[116]See: *Clark v. Williard* (1934), 292 U. S. 112, 123-124, 78 L. Ed. 1160, 1167, 54 S. Ct. 615, 620-621; *Penn General Casualty Co. v. Pennsylvania ex rel. Schnader* (1935), 294 U. S. 189, 198-199, 79 L. Ed. 850, 857, 55 S. Ct. 386, 390-391; *Pennsylvania v. Williams* (1935), 294 U. S. 176, 182-184, 79 L. Ed. 841, 846-847, 55 S. Ct. 380, 383-385; *State Savings & Commercial Bank v. Anderson* (1913), 165 Cal. 437, 446-447, 32 Pac. 755, 758-759 (affirmed (1915), 238 U. S. 611, 59 L. Ed. 1488, 35 S. Ct. 792); *Mitchell v. Taylor* (1935), 3 Cal. (2d) 217, 219, 43 Pac. (2d) 803.

that a statute requires interpretation does not deprive one who is not required to interpret it of due process of law.

The point that the agreement here approved impaired the obligation of petitioners' contracts falls before the principle, enunciated in this court time and time again, that private contracts must give way to the police power of the state when that power is not capriciously exercised.

No substantial Federal question is raised; and the decision of the trial court is directly in accord, on every Federal point, with many cases heretofore decided by this court.

It is respectfully urged that certiorari be denied.

Respectfully submitted,

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Due service of the within brief is hereby acknowledged this _____ day of April, A. D. 1938.

_____

Attorneys for Petitioners.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1937.

No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED M. MACDONALD,

Petitioners,

v.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

Brief of Respondents, Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel in Opposition to Petition for Certiorari.

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I.

II.

III.

IV.

SUBJECT INDEX.

PAGE

'pinions Below 1

urisdiction 2

tatement 3

rgument 9

Prefatory Statement 9

Summary of the Argument 9

A. Petitioners' contention that the Commissioner's petition for his appointment as conservator was insufficient to vest the Superior Court with jurisdiction is without merit. It involves a matter of state law which the State Supreme Court has decided against them, and presents no federal question 13

B. The orders made by Judge Willis are valid and are independent of the void orders made by Judge Edmonds 19

C. The State Supreme Court held as a matter of state law that the Commissioner could and did lawfully conduct the business of the Old Company through his corporate instrumentality, the New Company. Asserted error in this regard does not present a federal question nor are petitioners aggrieved thereby 22

D. The asserted error of the State Supreme Court in construing the State Insurance Code so as to permit the rehabilitation of the business of an insolvent insurance company by means of a new company, does not present a federal question 24

PAGE

E. The provision of the Insurance Code of California, that the Commissioner as conservator may, subject to the approval of the court, enter into rehabilitation agreements, is not vague or uncertain and is constitutional 25

F. The conveyance to the New Company was neither fraudulent nor void 26

G. There has been no impairment of the obligation of contract in violation of Article I, Section 10 of the Federal Constitution, nor any unlawful discrimination 28

Appendix 35

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Acme Harvester Company v. Beekman Lumber Company, 222 U. S. 300 6

Clary v. Hoagland, 6 Cal. 685 17

Cline v. Frink Dairy Co., 274 U. S. 445 25

Connally v. General Construction Co., 269 U. S. 385 25

Corrigan v. Buckley, 271 U. S. 323 18

Daman v. Hunt, 47 Cal. App. 274 ..... 17, 18

Davidson v. New Orleans, 96 U. S. 97, 104 18

Dohany v. Rogers, 281 U. S. 362 18

Doty v. Love, 295 U. S. 64 ..... 18, 29, 33

East Tennessee V. & G. R. Co., v. So. Tel. Co., 112 U. S. 306 17

Fairbanks Shovel Co. v. Wills, 240 U. S. 642 6

Gray v. Gray, 185 Cal. 598 8

Harris v. Seidell, 1 Cal. App. (2d) 410 17

Hentschel v. Fidelity & Deposit Co. of Maryland, 87 Fed. (2d) 833 23

Hiscock v. Varick Bank of New York, 206 U. S. 28 6

Levezey v. Gorgas (Penn.), 4 Dall. 71 23

Murray v. American Surety Co., 70 Fed. 341 16

Myers v. Canepa, 37 Cal. App. 556 8

Natl. Surety Co. v. Coriell, 289 U. S. 426 32

North Laramie Land Co. v. Hoffman, 268 U. S. 276 18

Northern Pacific Railway Co. v. Boyd, 228 U. S. 482 27

Quong Ham Wah Co. v. Industrial Commission, 255 U. S. 445 ..... 22, 23, 24

Schechter v. United States, 295 U. S. 495 23

PAGE

Scrimsher v. Reliance Rock Co., 1 Cal. App. (2d) 382..... 17

Small Co. v. American Sugar Refining Co., 267 U. S. 233..... 25

Smith v. Westerfield, 88 Cal. 374.....16, 17

Standard Chem. & Metals Corp. v. Waugh Chem. Corp., 231 N. Y. 51, 14 A. L. R. 1054..... 25

Standard Oil Co. v. Missouri, 224 U. S. 270, 280..... 17

CODES AND STATUTES.

Code of Civil Procedure, Sec. 21.....13, 35

Code of Civil Procedure, Sec. 22.....13, 35

Code of Civil Procedure, Sec. 23.....13, 35

Constitution of California, Art. VI, Sec. 5, 1st paragraph.....13, 35

Insurance Code, Sec. 1011.....11, 14, 15, 27, 35

Insurance Code, Sec. 1013.....5, 10, 20, 37

Insurance Code, Sec. 1015.....20, 38

Insurance Code, Sec. 1043.....25, 26, 38

Insurance Code, Sec. 1035..... 38

Judicial Code, Sec. 237 (b), 28 U. S. C. A., Sec. 344 (b)..... 2

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937.

No. 921.

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED M. MACDONALD,

Petitioners,

v.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, CHARLES ROSS COOPER, *et al.*,

Respondents.

Brief of Respondents, Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel in Opposition to Petition for Certiorari.

I.

Opinions Below.

The opinion of the State Supreme Court has not been officially reported, but has been printed in the advance opinions of that court, 94 Cal. Dec. 681, and in the Pacific Reporter, 74 Pac. (2d) 761. It appears

in the record [R. 1516 *et seq.*]. Although not strictly a part of the record, the oral opinion of the trial court was transcribed and may be found in the record, pages 1469 *et seq.*

II.

Jurisdiction.

Petitioners invoke the jurisdiction of this court under section 237 (b) of the Judicial Code (U. S. C., Title 28, Sec. 344 (b)).

Two of the ten points urged by petitioners involve rights claimed by them under the Constitution of the United States. While federal questions are thus presented, it is the position of these respondents that (1) the questions are not of serious import; (2) they are unsubstantial; and (3) the one urged to, and considered by, the State Supreme Court was decided by that court in accordance with the applicable decisions of this court.

The other points made by petitioners involve the question whether the state court under the pleadings ever obtained jurisdiction of the subject matter, asserted errors of the state court in interpreting state statutes, and the effect of valid orders of the Superior Court. These we conceive to be purely matters of state law, and the supposed error of the State Supreme Court in deciding them, although asserted to be a denial of due process, does not, we contend, present federal questions reviewable here.

III.

Statement.

The respondents submitting this brief in opposition o the petition for *certiorari* were for many years gen- ral agents of The Pacific Mutual Life Insurance Com- any of California (the old company) [R. 1259-1265]. our of them are holders of life policies and non-can- ellable income policies issued by the Old Company [R 266-1269], and they own in the aggregate more than ,000 shares of its capital stock [R. 1270]. They inter- ened in the proceedings before the Superior Court on heir own behalf and on behalf of all the general agents nd managers of the Old Company [R. 1258] and filed riefs in the State Supreme Court in support of the rder approving the Insurance Commissioner's revised lan of rehabilitation.

These respondents cannot accept the statement of the ase as made by petitioners (Petition pp. 4-11). A cor- ect and accurate statement of the facts and the pro- eedings in the Superior Court is given in the opinion f the State Supreme Court [R. 1516-1544]. In the nterests of brevity we will not give a restatement of he facts, but instead we will briefly point out the more utstanding errors in petitioners' statement and supply the missions of important facts.

It is conceded, that all orders made in the Superior Court by Judge Douglas L. Edmonds are void by rea- on of the fact that he was a policyholder in the Old Company and thereby disqualified [R. 1526-1527]. We

admit that the order of Judge Edmonds appointing the Commissioner conservator has not been set aside by the Superior Court (Pet. p. 10). But we take issue with petitioners' statement (Pet. p. 10) that the remaining orders of Judge Edmonds have never been set aside and that they stand unimpaired at the moment, affirmed by the highest state court. While the record does not affirmatively state that Judge Edmonds' order appointing the Commissioner liquidator and his orders approving the Commissioner's original plan and an amendment thereto have ever been vacated, it does contain unequivocal indication that such is the fact, for Judge Willis, in his order of December 4, 1936, approved a new and revised plan of the Commissioner, referred to him as conservator, and spoke of him as being thereafter appointed liquidator [R. 1378 *et seq.*, particularly 1389]. The State Supreme Court declared that all of Judge Edmonds' orders were void [R. 1526-1527] and under no possible construction of the opinion of that court or the order appealed from can it possibly be said that any of Judge Edmonds' orders were affirmed by the State Supreme Court.

We also take issue with the statement of petitioners, that the amended plan was again approved on December 4, 1936, that the order was *nunc pro tunc*, and that the void orders of Judge Edmonds were reconfirmed (Pet. p. 11). Most particularly we disagree with the statement of petitioners that without the confirmation of the void orders the whole proceedings fall (Pet. p. 11). These assertions apparently are based upon the fact that Judge Willis in his order of December 4, 1936, ratified and confirmed the acts of the Commissioner and the prior conveyance of the assets made on July 22, 1936

[R. 1387-1388] and that the effective date of the rehabilitation agreement approved in said order was July 22, 1936 [R. 1398].

The State Supreme Court, deciding a matter of state law, expressly and explicitly held that although the Commissioner was not on July 22, 1936, either conservator or liquidator or authorized by any valid order of the Superior Court to take over the business of the Old Company, yet he could, and did lawfully under section 1013 of the Insurance Code, take over and operate such business and could and did lawfully and legally conduct such business through the agency or instrumentality of the New Company [R. 1527-1529].

A distinction must be made between the void orders of Judge Edmonds and the lawful acts of the Commissioner. The latter could be and were ratified, but this does not mean that the void orders were confirmed. In the single instance where Judge Willis purported to ratify Judge Edmonds' order appointing the Commissioner conservator [R. 325], he also made the appointment himself *de novo* [R. 325], and, even if it be assumed that orders made by a disqualified judge cannot be adopted or ratified by a qualified judge, the fact that Judge Willis attempted to do so cannot vitiate the balance of his order.

Under the heading, "Reasons relied on for the allowance of the writ," petitioners say (Pet. p. 12) that the State Supreme Court "held that title to all of the assets of the old company * * * was lodged in the new company * * * on July 22, 1936, by the Commissioner's conveyance made pursuant to the void orders of the lower court." This is not a correct construction

of the decision of the California Supreme Court. That court stated that the conveyance to the New Company occurred pursuant to statutory authority and order of court [R. 1541]. It was not necessary to determine, and the State Supreme Court did not determine at what precise moment title vested in the New Company. It is possible that on August 11, 1936, the title of the Commissioner related back to July 22, 1936 (compare, *Hiscock v. Varick Bank of New York*, 206 U. S. 28, 40; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307; *Fairbanks Shovel Co. v. Wills*, 240 U. S. 642, 649), so that the New Company's title likewise related back by ratification under the order of December 4, 1936. On the other hand it may be that the New Company did not acquire title until after December 4, 1936, by a new conveyance authorized that day by the court and presumably made by the Commissioner. If the order of December 4, 1936 is otherwise valid, it is not easily perceived how or in what manner petitioners (who are policyholders) have been injured, much less deprived of constitutional rights, or how the validity of said order can be questioned in this court, because (as claimed) title vested in the New Company as of July 22, 1936.

Petitioners assert that nothing was said by the Commissioner in his petition for appointment as conservator about the insolvency or hazardous condition of the Old Company on July 22, 1936 (Pet. p. 12). Although this statement is contrary to fact, its consideration more

properly belongs in the argument, where we will briefly treat it.

Petitioners say that the Supreme Court of California held "that all of the orders made in consummation of the reorganization were absolutely void" (Pet. p. 15). This is not a correct statement. The State Supreme Court expressly held that, while all of Judge Edmonds' orders were void, "The subsequent proceedings before Judge Willis stand by themselves independently of the prior orders" [R. 1527], and that Judge Willis' orders were valid.

Petitioners further assert as a reason for the allowance of the writ of certiorari that "no liquidator was ever appointed for the old company" and that a dissenting policyholder "had no place to go. His policy was lost, because the court provided no liquidator with whom he could file his claim." (Pet. p. 17). It is true that the only order appointing a liquidator which *appears in the record* is Judge Edmonds' order of July 22, 1936, which was held void by the State Supreme Court. But the rehabilitation agreement approved by Judge Willis in his order of December 4, 1936, in terms contemplated the appointment of the Commissioner as liquidator [R. 1421] and the order, itself, likewise had such appointment in contemplation [R. 1389]. Moreover, jurisdiction was expressly reserved [R. 1390] as the State Supreme Court pointed out [R. 1526].

In the proceedings before Judge Willis the Commissioner was first appointed conservator, then his revised

plan was approved. The third step, that of appointing the Commissioner liquidator, naturally had not been taken by December 4, 1936, which is the point of time to which the record from the Superior Court carries these proceedings. The presumption is that the Superior Court performed its duty and appointed the Commissioner liquidator.*

In considering the arguments advanced by petitioners and by *amici curiae* it is important to bear in mind that the record before the State Supreme Court consisted of the judgment roll alone. No evidence was brought up. At the time petitioners took their appeal to the State Supreme Court it had long been and still is the rule that in such case every intendment is in favor of the judgment or order appealed from, and if error does not affirmatively appear, the judgment below will be sustained if there is any possible ground on which it can be sustained (*Myers v. Canepa,* 37 Cal. App. 556, 560), and that facts alleged in the pleadings or recited in the order which tend to support the order are deemed to have been proved by competent evidence (*Gray v. Gray,* 185 Cal. 598, 599). The State Supreme Court in its opinion applied these rules [R. 1528 and 1539].

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*NOTE: While the contention that no liquidator was appointed was evidently not made below [R. 1544], it seems obvious that the state Supreme Court either relied on this presumption or upon its judicial knowledge. In any event that court expressly held that dissenters "are allowed and will be paid the amount allowed by law as the measure of damages * * *." [R. 1539.]

IV.

ARGUMENT.

Prefatory Statement.

Of the ten points urged by petitioners, point D (that Judge Edmonds' orders were void) may be conceded. Seven points, A, B, C, E, F, G and I, deal with asserted errors of the State Supreme Court in deciding matters of state law and do not present a federal question. Moreover, they are based upon a misconception of the decision of that court. They furnish no valid reason for granting certiorari. Only two points (H and J) even remotely involve federal questions. Point H (that Sec. 1043 of the Insurance Code is so vague and uncertain as to be unconstitutional) was not raised below. But the point, we believe, is without merit. The remaining constitutional point was passed on by the State Supreme Court and, we submit, decided in accordance with the applicable decision of this court. Both points concern matters so unsubstantial on the record that they furnish no ground, it is believed, for granting the writ of certiorari.

Summary of the Argument.

A. Petitioners' contention (Pet. pp. 33-36) that the allegations of the Commissioner's petition for his appointment as conservator were insufficient in substance and, since the proceedings were special, the Superior Court did not acquire jurisdiction, is without merit. The allegations of the Commissioner's petition were clearly sufficient, and the State Supreme Court so held, and this holding on a matter of state law is conclusive here. No

federal question is presented. Petitioners were accorded due process of law.

B. The contention of petitioners that the New Company's title to the assets was lodged in it by the void order of Judge Edmonds is completely answered by the fact that Judge Willis made a new order vesting title in the Commissioner and thereafter ratified the prior conveyance and authorized a new one. Petitioners are not aggrieved by the holding of the Supreme Court that the Commissioner's seizure was proper under section 1013 of the Insurance Code, although he was then neither conservator nor liquidator. This seizure was a preliminary step and petitioners, as policyholders, were at no time entitled to the possession of the assets. They cannot logically contend that the proceedings of July 22 were void (so that the Commissioner then had no title to convey) and in the next breath claim that the Commissioner had nevertheless passed title to such assets to the New Company so that Judge Willis could not vest him with title on August 11th.

C. Petitioners cannot properly contend that the decision of the State Supreme Court is void as being in direct violation of law, because that court held that the Commissioner during rehabilitation could conduct the business of the Old Company through his corporate instrumentality, the New Company. This question was peculiarly a matter of state law which it was the exclusive province of the State Supreme Court to decide and the asserted error in that regard is not reviewable here. Nor does the alleged error amount to a denial of due process of law. In any event it does not appear that petitioners are aggrieved.

D. Nor can petitioners properly assert that said decision is erroneous because the state court construed the California Insurance Code as authorizing the Commissioner to rehabilitate the business of an insurance company by means of a new corporation. Such contention does not present a federal question.

E. The provision of the California Insurance Code, that the Commissioner may, subject to the approval of the court, enter into rehabilitation agreements, is not vague or uncertain and is constitutional. Said section is a grant of power to be exercised by the Commissioner under the direction of the Superior Court. He is neither forbidden nor required to enter into such agreements and neither he nor the other party to the agreement acts at his peril. The term "rehabilitation agreements" has a well recognized meaning.

F. The conveyances were neither fraudulent nor void. The transfer from the Old Company to the Commissioner was effected by Judge Willis' order of August 11th and the express provisions of section 1011 of the Insurance Code. The transfer from the Commissioner to the New Company was made pursuant to Judge Willis' order of December 4th, and obviously could not be a fraudulent conveyance. The fact that the Old Company joined in the deed and bill of sale of July 22, 1936, from the Commissioner to the New Company is immaterial.

G. There has been no impairment of the obligation of contract or any unlawful discrimination between holders of non-can policies and life policyholders. Holders of life policies are given two options, to consent and have their policies assumed in full by the New Company or to dissent and receive the full amount of their provable

claims. Holders of non-can policies are likewise given two options, to consent and have their policies unconditionally assumed as to part and conditionally assumed as to the balance, or to dissent and receive the full amount of their provable claims. No policy holder has a constitutional right to insist upon complete liquidation. All dissenters are treated alike. It is to be presumed that dissenters of every class will receive as much, or more, as they would on complete liquidation. It is likewise to be presumed from the record that holders of non-can policies who consent will receive greater benefits than they would on complete liquidation. The contention that dissenters of all classes are left without remedy because by December 4, 1936, a liquidator had not been validly appointed is untenable. The presumption is that the Superior Court and the Commissioner performed their duties and that a liquidator has been appointed. The contention that the plan discriminates between holders of life policies and non-can policies is not supported by the record, and is in the teeth of the adjudication of the trial court that the plan was fair, just and equitable. As pointed out by the State Supreme Court, it must be presumed that the evidence adequately supported this adjudication. The apparent contention of *amici curiae* that the absence of special findings indicates the absence of competent evidence to support the order is contrary to the presumptions applicable on an appeal on the judgment roll alone.*

---

*NOTE: We understand that Josiah E. Brill and Samuel H. Maslon, *amici curiae*, have not as yet been granted leave to file their brief in support of the petition for certiorari. Should such leave be granted, time would not permit a separate answer. Accordingly, we have decided to reply to their contentions.

A. PETITIONERS' CONTENTION THAT THE COMMISSIONER'S PETITION FOR HIS APPOINTMENT AS CONSERVATOR WAS INSUFFICIENT TO VEST THE SUPERIOR COURT WITH JURISDICTION IS WITHOUT MERIT, IT INVOLVES A MATTER OF STATE LAW WHICH THE STATE SUPREME COURT HAS DECIDED AGAINST THEM, AND PRESENTS NO FEDERAL QUESTION. [Answering Petitioners' Point A.]

As we understand petitioners' Point A (Pet. pp. 33-36), their contention is that the proceedings were special proceedings; that the Superior Court could obtain jurisdiction only on a sufficient petition; that the petition was insufficient; that consequently all orders (including those made by Judge Willis) were void, and that petitioners have, therefore, not been accorded due process.

Under the state law all civil remedies are either actions or special proceedings (C. C. P., sections 21, 22, 23). All special proceedings are statutory (as for instance eminent domain, enforcement of mechanics' liens, probate proceedings and many others). These special proceedings are found in the Code of Civil Procedure and other codes [R. 1531].

The State Constitution gives the Superior Court original jurisdiction in all civil cases and proceedings, with exceptions not here material (California Constitution, Article VI, Section 5, first pargraph).

The Old Company was a California corporation with its principal place of business in Los Angeles County [R. 2].

In 1936, section 1011 of the Insurance Code provided in part as follows:

> "Upon the filing, by the Commissioner, with the Superior Court in the county in which is located the principal office of such person in this state, of a verified application showing any of the following conditions to exist: * * *
>
> (d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or creditors, or to the public. * * *.
>
> Or, upon the filing, by the commissioner, of a verified application accompanied by a certified copy of the commissioner's last report of examination of any person to whom the provisions of this article apply showing such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this code, said court shall issue its order vesting title to all of the assets of said person, wheresoever situated, in the commissioner or his successors in office, in his official capacity as such, and directing the commissioner * * * to conduct, as conservator, the business of said person, * * *."

The Commissioner's petition for his appointment as conservator and for the vesting of the assets of the Old Company in him [R. 1-32] was verified [R. 9] and contained as an exhibit a certified report of examination [R. 11-32], dated July 21, 1936 [R. 12], as of December 31, 1935 [R. 13], showing a deficit of approximately $23,000,000.00 [R. 30-31]. The report concluded with

the statement that "from a survey of the above figures it is apparent that immediate action must be taken to protect policyholders" [R. 32]. The Commissioner alleged that he had joined in such report and he made it a part of his petition [R. 3]. He alleged "that said examination and report shows that respondent corporation *is* in such condition that its further transaction of business will be hazardous to its policyholders, its creditors and to the public; that said examination and report further shows that respondent corporation *is* insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of the Insurance Code of the State of California * * *" [R. 3].

The State Supreme Court said:

> "The petition for appointment as conservator, containing proper allegations, was filed July 22d." [R. 1528].

The Commissioner, by adopting the report and alleging that the same showed the Old Company to be in a hazardous condition, *ipso facto* made a finding to that effect, and the petition was proper under subdivision (d) of section 1011 of the Insurance Code. Although the report was made as of December 31, 1935, it was dated the day before his petition was filed and his allegation is that it shows the Old Company "is insolvent" [R. 3]. The Superior Court decreed (presumably upon competent evidence) that the Old Company was insolvent within the meaning of the Insurance Code both on December 31,

1935, and on July 22, 1936 [R. 1385] and that it was in a hazardous condition on July 22, 1936 [R. 1386]. The State Supreme Court approved this adjudication, saying:

> "The company was technically insolvent as that term is defined in the Insurance Code, but by no means bankrupt." [R. 1528.]

It appears from the foregoing that petitioners' contentions are not well founded in fact and are without merit and that the decision of the State Supreme Court is squarely against them. As petitioners took their appeal on the judgment roll alone, their assertion "that there was no evidence before the court or nothing by which it could determine that the Old Company was insolvent on July 22, 1936 * * *" (Pet. p. 35), is not supported by the record and is contrary to the presumptions [R. 1528, 1539].

The cases cited by petitioners do not lead to a contrary conclusion.

In *Murray v. American Surety Co.*, 70 Fed. 341, (Pet. pp. 33, 34) the question was whether the plaintiff, the receiver of a state bank, had capacity to sue. The Circuit Court of Appeals for the Ninth Circuit, in the light of decisions of the California courts, held that under the particular statute involved there was no authority in the Superior Court for the appointment of a receiver.

Smith v. Westerfield, 88 Cal. 374, was an appeal from an order of the Superior Court sitting in probate and

it was held that the court had acted in excess of its jurisdiction. However, the Supreme Court of California said:

> "Our appellate jurisdiction over the judgments of the Superior Court includes those in which that court improperly assumed jurisdiction, as well as those in which it was properly entertained."
>
> 88 Cal. 380, 381.

It follows that under any theory the State Supreme Court had jurisdiction over petitioners' appeal and therefore jurisdiction to determine that the Superior Court had jurisdiction, which it impliedly did by affirming the judgment. (Compare *Clary v. Hoagland,* 6 Cal. 685, 687-688; *Schrimsher v. Reliance Rock Co.,* 1 Cal. App. (2d) 382, 393; *Harris v. Seidell,* 1 Cal. App. (2d) 410, 417; *Standard Oil Company v. Missouri,* 224 U. S. 270, 280-281.)

The case of *East Tennessee V. & G. R. Co. v. So. Tel. Co.,* 112 U. S. 306 (Pet. p. 34) has no bearing on the case at bar. There on appeal from a decision of the Circuit Court, this court held that the trial court, upon removal of a special proceeding from the state court, was limited by the applicable provisions of the state law.

Petitioner's quotation of the statement (Pet. pp. 34-35) that insolvency proceedings are special and no intendments can be made in favor of the jurisdiction, appears in *Daman v. Hunt,* 47 Cal. App. 274, 281, which relied on decisions of the former Supreme Court under the California Constitution of 1849. It is to be noted that the Supreme

Court of California, in denying a hearing in the *Daman* case, expressly withheld its approval of the very language quoted and relied upon by petitioners (47 Cal. App. 289, 290).

While the record herein would sustain no other holding by the State Supreme Court than the one which was given, namely, that the allegations of the Commissioner's said petition were proper, we submit that even if the State Supreme Court had committed error in that regard, no federal constitutional question would be presented. Petitioners appeared, filed pleadings and presumably were heard in support thereof. They cannot complain of lack of due process. (*Doty v. Love*, 295 U. S. 64, 74.) The procedure in the state court satisfied the due process clause. (*Davidson v. New Orleans*, 96 U. S. 97, 104-105; *Dohany v. Rogers*, 281 U. S. 362, 369.)

Whether, under a proper construction of section 1011 of the Insurance Code, the petition that was filed was sufficient, is a matter of state law decided by the State Supreme Court, and its decision is conclusive here.

North Laramie Land Co. v. Hoffman, 268 U. S. 276, 282.

"Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law."

Corrigan v. Buckley, 271 U. S. 323, 332.

B. THE ORDERS MADE BY JUDGE WILLIS ARE VALID AND ARE INDEPENDENT OF THE VOID ORDERS MADE BY JUDGE EDMONDS. [Answering Petitioners' Points B, C and E.]

Petitioners' contention under their points B (Pet. pp. 36 to 38), C (Pet. pp. 39 and 40) and E (Pet. pp. 43 to 45) are based upon a misconception of the facts and the decision of the Supreme Court of California. Their theory (Pet. p. 37), that the New Company claims title to assets lodged in it by the void orders of Judge Edmonds and that no other transfer has been made, is a repetition of the statements made in the petition proper and already has been noticed.

Their statement (Pet. p. 38), that the State Supreme Court tacitly held that the consent of the Old Company and the appearance of those making objections waived the void character of Judge Edmonds' orders, is plainly incorrect. The State Supreme Court distinctly held that Judge Edmonds' orders were void and it did not tacitly or otherwise hold that the void character had been waived.

Petitioners' further statement (Pet. p. 39), that the State Supreme Court held that Judge Willis by approving Judge Edmonds' orders made them valid, has reference to the paragraph of the opinion of the State Supreme Court [R. p. 1521] reciting the fact that Judge Willis in his order of August 11th ratified and adopted Judge Edmonds' order appointing the conservator. The State Supreme Court took pains however to point out that in the same order Judge Willis made the appointment *de novo* [R. pp. 1521-1522]. Even if the opinion of the State Supreme Court can be construed as holding that an order by a disqualified judge can be ratified and adopted

by a qualified judge, no constitutional rights of petitioners are thereby impaired, particularly where, as here, the order was also made *de novo*.

Petitioners complain of that portion of the opinion of the State Supreme Court holding that the Commissioner's seizure of the assets of the Old Company before he was validly appointed conservator was proper under section 1013 of the Insurance Code [R. p. 1528]. They urge that this was impossible in view of opinions of the California Supreme Court and other courts that statutory proceedings must be strictly followed. They also rely on section 1015 of the Insurance Code. But this was a matter of state law which the State Supreme Court conclusively determined contrary to petitioners' contention. Petitioners' rights were not affected by the seizure and it would seem that they have no constitutional complaint on account of preliminary steps taken by the Commissioner prior to the order of December 4, 1936, from which order alone they have appealed. Being policyholders they were at no time entitled to the possession of the assets and they are not aggrieved because the State Supreme Court held that the Commissioner was properly in control during the preliminary period.

The contention is made under petitioners' point E (Pet. pp. 43-45) that that portion of Judge Willis' order of August 11, 1936, which invested the Commissioner with title to the assets of the Old Company was futile, because petitioners say, "At that time there was nothing to conserve, nor any title in the old company to be vested in the Commissioner because he had parted with everything he had by his prior conveyance to the new company," (Pet. p. 43). They further say that it was impossible to vest title in the Commissioner without first taking back title

from the New Company (Pet. p. 44). Now petitioners cannot blow hot and cold. They cannot logically assert that the proceedings of July 22 were void (so that the Commissioner then had no title to convey) and in the next breath claim that title was passed by the Commissioner to the New Company on July 22, so that such title could not be vested in the Commissioner by Judge Willis' order of August 11th.

Petitioners say that Judge Willis' order to show cause, dated September 25, 1936 [R. 905-913] was an order to show cause why the void orders of Judge Edmonds should not be approved, referring particularly to pages 906 and 909 of the record. Nothing was said in the order to show cause about ratifying the prior orders of Judge Edmonds. All parties interested were required to show cause, among other things, why an order should not be made ratifying *the acts of the Commissioner.*

Petitioners assert (Pet. p. 44) that Judge Willis' order of December 4, 1936, confirmed *nunc pro tunc* the orders of Judge Edmonds [referring to the Record pp. 1387 and 1388]. Reference to the citation will demonstrate that Judge Willis ratified the various *acts of the Commissioner* but did not ratify the orders of Judge Edmonds.

The Supreme Court of California did decide that the petitioners had been accorded due process, but that court did not decide, as contended by petitioners (Pet. p. 44), that approval of the void orders was due process.

Petitioners' contentions under their points B, C and E, all relate to procedural matters not affecting their constitutional rights. Nothing said by petitioners under these points furnishes any basis for review by the Supreme Court of the United States.

C. THE STATE SUPREME COURT HELD AS A MATTER OF STATE LAW THAT THE COMMISSIONER COULD AND DID LAWFULLY CONDUCT THE BUSINESS OF THE OLD COMPANY THROUGH HIS CORPORATE INSTRUMENTALITY, THE NEW COMPANY. ASSERTED ERROR IN THIS REGARD DOES NOT PRESENT A FEDERAL QUESTION. NOR ARE PETITIONERS AGGRIEVED THEREBY. [Answering Petitioners' Point F.]

The State Supreme Court held that during the rehabilitation period the Commissioner lawfully conducted the business of the Old Company through his corporate agency the New Company and that the Superior Court validly approved such action. [R 1528-1529.]

Relying upon section 1035 of the Insurance Code and two other California statutes petitioners contend that the decision of the State Supreme Court "is void, because it is a direct violation of law" (Pet. pp. 46-47) and that the State Supreme Court thereby failed to apply the due process guaranteed by the federal constitution.

It seems too obvious to require argument that the question whether the Commissioner could or did lawfully delegate his authority was peculiarly a question of state law and required the interpretation of state statutes. Even if the interpretation were thought to be erroneous, that would not make the decision void, or furnish any valid reason for asserting lack of due process.

In *Quong Ham Wah Co. v. Industrial Commission*, 255 U. S. 445, a case coming to this court on a writ of error to the Supreme Court of California, it was said:

> "But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the State. *Commercial Bank v. Buckingham*, 5 How. 317, 342; *Johnson v. New York*

Life Insurance Co., 187 U. S. 491, 496; *Ross v. Oregon*, 227 U. S. 150, 162; *Ireland v. Woods*, 246 U. S. 323, 330; *Stadelman v. Miner*, 246 U. S. 544; *Erie R. R. Co. v. Hamilton*, 248 U. S. 369, 371-372." 255 U. S. 448.

Even if it be assumed that the New Company was temporarily a trespasser, it does not appear that petitioners are aggrieved by the decision holding the contrary. The Superior Court after full hearing confirmed the method and ratified all the Commissioner's acts. Petitioners as simple contract creditors were not entitled to the possession of the assets and the record is barren of any suggestion that their rights were impaired or prejudiced by reason of the operations. On the contrary the opinion points out the benefits accruing from such procedure. [R 1528.]

The cases cited by petitioners (Pet. p. 47) do not support their contentions. *Schechter v. United States*, 295 U. S. 495, involved the validity of a federal law under the federal constitution. In *Hentschel v. Fidelity & Deposit Company of Maryland*, 87 Fed. (2d) 833, the Circuit Court of Appeals of the Eighth Circuit made some observations as to the power of the Missouri Superintendent of Insurance under Missouri statutes. *Levezey v. Gorgas* (Pennsylvania) 4 Dall. 71 was a decision by the High Court of Errors and Appeal of Pennsylvania passing on a matter of state law. In none of these cases did this court deny to a state court the power to interpret its own statutes or hold that a construction such as was here given to the Insurance Code was violative of constitutional rights.

Petitioners' point F does not, we submit, present a federal question.

D. THE ASSERTED ERROR OF THE STATE SUPREME COURT IN CONSTRUING THE STATE INSURANCE CODE SO AS TO PERMIT THE REHABILITATION OF THE BUSINESS OF AN INSOLVENT INSURANCE COMPANY BY MEANS OF A NEW COMPANY DOES NOT PRESENT A FEDERAL QUESTION. [Answering Petitioners' Point G.]

Petitioners assert that the State Supreme Court after a long and "erroneous discussion" of certain New York cases, declares that the Commissioner has the implied power to rehabilitate the business of an insurance company by means of a new corporation (Pet. p. 49). They insist that the New York cases do not support the decision and further that there are no powers which may be implied from a special statute. The portion of the opinion to which petitioners refer may be found at pages 1534-1538 of the record.

Again it must be pointed out that the State Supreme Court had plenary authority to construe the California statute. The contention that such construction is erroneous does not raise a federal question.

Quong Ham Wah Co. v. Industrial Commission, 255 U. S. 445, 448.

Amici curiae, while purporting to argue petitioners' point G, apparently do not deny the state court the power to construe state statutes, but they seemingly urge that the statute as construed is invalid. Consideration of this contention more logically belongs under our answer to petitioners' point J.

E. THE PROVISION OF THE INSURANCE CODE OF CALIFORNIA, THAT THE COMMISSIONER AS CONSERVATOR MAY, SUBJECT TO THE APPROVAL OF THE COURT, ENTER INTO REHABILITATION AGREEMENTS, IS NOT VAGUE OR UNCERTAIN AND IS CONSTITUTIONAL. [Answering Petitioners' Point H.]

Section 1043 of the California Insurance Code provides in part that the Commissioner as conservator or as liquidator may "subject to the approval of said court * * * enter into rehabilitation agreements".

Petitioners assert (Pet. p. 49) that the clause quoted is so vague and uncertain that any action taken under it violates the first essential of due process of law, citing *Connally v. General Construction Co.*, 269 U. S. 385; *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*, 231 N. Y. 51, 14 A. L. R. 1054, and *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233.

The first two cases cited reiterate the well established rule, that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. The other two cases cited hold that contracts are not void because in contravention of a vague and uncertain statute. None of these decisions has any application to the case at bar. Section 1043 of the Insurance Code neither forbids nor requires the Commissioner to enter into rehabilitation agreements. Any

such agreement cannot and does not become effective until approved by the Superior Court and neither the Commissioner nor the other party to the rehabilitation agreement is placed in the peril of conforming to a vague or uncertain law.

On the contrary, section 1043 is a general grant of power to the Commissioner to be exercised in his discretion, subject to the control and approval of the Superior Court in the first instance and the revisory powers of the state appellate courts in the second instance.

It is usual for state laws to authorize an executor or administrator to enter into leases on the decedent's property, subject to confirmation by the court without specifying further particulars. It would be just as logical to argue that such laws are unconstitutional because of vagueness and uncertainty, as it is to make such argument in respect to section 1043 of the Insurance Code.

In any event, the term "rehabilitation agreements" has a well recognized meaning. We submit that petitioners' point H is without merit.

F. THE CONVEYANCE TO THE NEW COMPANY WAS NEITHER FRAUDULENT NOR VOID. [Answering Petitioners' Point I.]

Petitioners reiterate their contention that the only conveyance in favor of the New Company is the "deed and bill of sale" executed by the Commissioner in his purported capacity as liquidator of the Old Company on July 22, 1936 [R. 183-190] and that this was the conveyance which the State Supreme Court held to be valid although supported only by a void order (Pet. p. 52). Petitioners then call attention to the fact that the Old

Company joined in said deed and bill of sale [R. 190], insisting that the validity of that conveyance was not helped by this fact because the Old Company's joinder was void under the fraudulent transfer sections of the California Civil Code.

We have already pointed out that the Commissioner's said conveyance was ratified by Judge Willis in his order of December 4, 1936, and that presumably a new conveyance was made by the Commissioner on or after December 4, 1936, pursuant to the express authority contained in said order.

Respondents have never contended nor do they now contend that the New Company derives title by conveyance direct from the Old Company. The New Company's chain of title is through the Commissioner, as the State Supreme Court properly held [R. 1541].

The case of *Northern Pacific Railway Company v.* Boyd, 228 U. S. 482, cited by petitioners (Pet. p. 53), is not in point. In the case cited the stockholders purchased the assets of their company at foreclosure sale subjecting the same to the rights of certain creditors but ignoring Boyd who was not a party and who did not consent. In the case at bar the first transfer was from the Old Company to the Commissioner by virtue of the order of August 11, 1936, and the express provisions of section 1011 of the Insurance Code. The transfer from the Commissioner to the New Company was made pursuant to the order of court. All of the stock of the New Company is part of the assets of the Commissioner as conservator or liquidator.

G. THERE HAS BEEN NO IMPAIRMENT OF THE OBLIGATION OF CONTRACT IN VIOLATION OF ARTICLE I, SECTION 10 OF THE FEDERAL CONSTITUTION, NOR ANY UNLAWFUL DISCRIMINATION. [Answering Petitioners' Point J and the brief of *amici curiae*.]

Petitioner Wm. H. Neblett is the holder of a life policy issued by the Old Company. The other three petitioners hold non-can policies. Josiah E. Brill, *amicus curiae*, states that he holds a non-can policy (Br. of *amici curiae*, pp. 1, 2).

The petitioners make three contentions: (1) that the contracts of the life policyholders have been violated by compelling them to accept the New Company as the insurer in place of the old; (2) that the contracts of the non-can policyholders have been impaired by compelling them to take a reduction of benefits; (3) that the contracts of both classes of policyholders have been impaired by destroying their right to any benefits under the reorganization unless they assent to it (Pet. pp. 54-56). The brief of *amici curiae* apparently urges a fourth point, namely, that the plan makes an unlawful discrimination between holders of life policies and holders of non-can policies.

1. It is not correct to state, as petitioners do, that the holders of life policies are compelled to accept the New Company as insurer in the place of the Old. The Old Company having been found to be insolvent, the state, acting under its police power, took steps to protect all persons interested in the Old Company. The insolvency of the Old Company was brought about by factors over

which the state had no control. The plan of rehabilitation gives to holders of life policies two options: (1) to consent to the plan and have their policies assumed in full by the New Company, or (2) to dissent and file a claim with the Commissioner thereafter to be appointed liquidator. Under the rehabilitation plan the Commissioner holds certain assets and in addition the New Company is obligated to pay over to him the *pro rata* share of the reserves behind each policy of those policyholders who dissent from the plan. The evidence introduced before the Superior Court is not in the record. In view of the adjudications contained in the order of December 4, 1936, and the presumptions and intendments in favor of such order it must be presumed that dissenting holders of life policies will receive as much, or more, in payment of their claims as they would upon complete liquidation. The fact that difficulties overtook the Old Company did not give petitioner Neblett or the other life policyholders the right to insist on complete and final liquidation instead of rehabilitation (*Doty v. Love*, 295 U. S. 64, 70). Petitioner Neblett was, therefore, given the only two options to which he was constitutionally entitled, namely, to consent and have his policy assumed by the New Company, or to dissent and receive the full amount of his provable claim. Said petitioner and other life policyholders have no constitutional right to a third option, namely, liquidation instead of rehabilitation.

2. The holders of non-can policies likewise were given two options: (1) to consent to the plan and have the

policies unconditionally assumed by the New Company at from twenty to ninety per cent of the face value, depending upon the date on which the policy was issued, and conditionally with interest as to the remaining portions of each non-can policy payable out of certain portions of the profits of the New Company, or (2) to dissent from the plan and file a claim with the Commissioner as liquidator.

To meet the claims of dissenting non-can policyholders the Commissioner had certain assets, and in addition the obligation of the New Company to pay him certain additional sums.

Again it is necessary to point out that the evidence before the Superior Court is not in the record. In support of the order appealed from, it must be presumed that dissenting holders of non-can policies will receive as much, or more, as they would receive on complete liquidation. For the same reasons it must likewise be presumed that the benefits to the consenting holders of non-can policies will be of far greater value than benefits to them upon complete liquidation. While non-can policyholders by consenting accept a reduction of benefits measured by the face amount of their policies, they do not accept a reduction of benefits measured by the liquidating value of such policies.

The plan of rehabilitation preserves for their benefit as well as for the benefit of all policyholders the valuable good will, agency organization and going concern values [R. 1386].

3. Petitioners' third contention under this point, applicable to all classes of policyholders, is that if they do not consent to the plan they will be left with absolutely nothing (Pet. p. 56). This argument is based upon the fact that the plan contemplated that dissenters should file their claims with the liquidator and upon their assertion that no liquidator was appointed. We have pointed out the error of this contention earlier in this brief. It is a sufficient answer to say that it must be presumed that the Commissioner and the Superior Court performed their respective duties and that the Commissioner has been appointed liquidator of the Old Company.

4. *Amici curiae* apparently urge a fourth point, namely, that the plan is unlawfully discriminatory, in that life policyholders are taken into the plan on more liberal terms than the non-can policyholders. This exact contention was urged before the State Supreme Court and considered by it in its opinion [R. 1538-1541]. We consider that the State Supreme Court has completely answered this point and invite the court's attention to the paragraphs of the opinion appearing at the pages cited. The trial court adjudged that the plan and agreement was feasible and that the operations under said agreement were feasible [R. 1386], and that the agreement and the plan embodied therein were fair, just and equitable [R. 1387]. Upon appeal on the judgment roll alone, it must be presumed that these adjudications were supported by the evidence. As the State Supreme Court pointed out, dissenters of both classes are treated the same. They are

allowed and will be paid the amount allowed by law as their measure of damages [R. 1539]. The State Supreme Court further pointed out that the record demonstrates that under the circumstances existing in this case the difference in treatment between life policyholders and non-can policyholders who consent to the plan was justified [R. 1540].

Amici curiae urge two additional arguments which, however, will require but brief consideration. Referring to the fact that there were no special findings and that the State Supreme Court interpreted the Insurance Code as not requiring findings, *amici curiae* become confused and seem to take the position that the absence of formal findings is the same as the absence of any competent evidence. They seem to urge that the decision of the State Supreme Court in this respect amounts to an impairment of the policies executed before the passage of that code. They cite *National Surety Co. v. Coriell,* 289 U. S. 426, where an order approving a reorganization plan was reversed because the record affirmatively showed that the trial court was without definite, detailed or authentic information. *Amici curiae* insist that the same situation prevails in the case at bar. In this they are plainly in error. Absence of special findings does not indicate an absence of evidence necessary to support the judgment. In fact, the presumption is quite the contrary. It cannot be successfully maintained, we believe, that anyone has a constitutional right to require the trial court to make formal findings of fact and conclusions of law.

Concluding this branch of the argument, *amici curiae* admit that both the State Supreme Court and the trial court found that the Commissioner's revised plan was fair and equitable but they urge there is nothing to show that sufficient facts were developed so that this court can determine that no constitutional rights have been violated (Br. of *amici curiae*, 8, 9). It seems plain that the burden was upon the appellants below, petitioners herein, to demonstrate affirmatively that their constitutional rights have been violated. *Amici curiae* are in no better position, and cannot shift the burden to respondents, because petitioners elected to appeal on the judgment roll alone.

The contention of *amici curiae* that the sections of the Insurance Code here involved did not constitute a moratorium statute is beside the mark. The sections deal with the conservation, rehabilitation and liquidation of insurance companies and do not purport to be a moratorium statute. *Amici curiae* as well as petitioners insist that the decision of this court in *Doty v. Love*, 295 U. S. 64, does not sustain the decision of the State Supreme Court. The case cited, however, cannot be distinguished in principle and supports the decision for the point to which it was cited.

We respectfully submit that neither the petitioners nor *amici curiae* have adduced any valid reason why a writ of certiorari should be granted. Most of petitioners' points involve matters of state law and are grounded upon either a misconception of the record or the contention that the

State Supreme Court committed error in interpreting a state statute. Petitioners' remaining points and those urged by *amici curiae* do not indicate the presence of federal questions of serious import really and substantially involved in the decision of the Supreme Court of California. Accordingly, we respectfully submit that the petition for writ of certiorari should be denied.

T. B. COSGROVE,

JOHN N. CRAMER,

Counsel for Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

APPENDIX.

California Constitution, Art. VI, Sec. 5 (1st Paragraph):

SUPERIOR COURT, JURISDICTION. The superior court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided, and except, also cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices or other inferior courts); in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; and of all such special cases and proceedings as are not otherwise provided for; and said court shall have the power of naturalization and to issue papers therefor.

Code of Civil Procedure, Secs. 21, 22, 23:

21. DIVISION OF JUDICIAL REMEDIES INTO CLASSES. These remedies are divided into two classes:

1. Actions; and
2. Special proceedings.

22. "ACTION" DEFINED. An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

23. SPECIAL PROCEEDING DEFINED. Every other remedy is a special proceeding.

Insurance Code, Sec. 1011:

Upon the filing, by the commissioner, with the superior court in the county in which is located the principal office of such person in this State, of a verified application showing any of the following conditions to exist:

(a) That such person has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the commissioner or his deputy or examiner.

(b) That such person has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer.

(c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person.

(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or creditors, or to the public.

(e) That such person has violated its charter or any law of the State.

(f) That a certificate of authority of such person has been revoked under section 10711.

(g) That any officer of such person refuses to be examined under oath, touching its affairs.

(h) That any officer or attorney-in-fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person.

(i) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked;

Or, upon the filing, by the commissioner, of a verified application accompanied by a certified copy of the commissioner's last report of examination of any person to whom the provisions of this article apply showing such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this code, said court shall issue its order vesting title to all of the assets of said person, wheresoever situated, in the commissioner or his successors in office, in his official capacity as such, and directing the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until a further order of said court.

Insurance Code, Sec. 1013:

Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately, the commissioner without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court. Any person having possession of and refusing to deliver any of the books, records or assets of a person against whom a seizure order has been issued by the commissioner, shall be guilty of a mis-

demeanor and punishable by fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both such fine and imprisonment.

Insurance Code, Sec. 1015:

Immediately after such seizure, the commissioner shall institute a proceeding as provided for in section 1011 and thereafter shall proceed in accordance with the provisions of this article.

Insurance Code, Sec. 1035:

In any proceeding under this article, the commissioner shall have the power to appoint and employ under his hand and official seal, special deputy commissioners, as his agents, and to employ such clerks and assistants and to give to each of them such power as may by him be deemed necessary. The compensation of special deputy commissioners, clerks and assistants appointed to carry out the provisions of this article, and all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of such person under this article, shall be fixed by the commissioner, subject to the approval of the court, and shall be paid out of the assets of such person.

Insurance Code, Sec. 1043:

In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, or enter into rehabilitation agreements. Such rehabilitation or reinsurance agreements shall provide that, subsequent to the date thereof and for such period of time

as the commissioner may determine, no investment or reinvestment of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the commissioner.

Every party to such agreement, and every director, officer, agent and employee of such person, and every other person who knowingly in violation thereof directs or aids or assists in causing to be made an investment or reinvestment of any of said assets without first having obtained the written approval of the commissioner, or who makes such investment or reinvestment in nonconformity with the written approval of the commissioner then in effect authorizing such investment or reinvestment, is guilty of a public offense and shall be punished by imprisonment in the State prison not exceeding five years or in the county jail not exceeding two years, or by a fine not exceeding $5000, or by both such fine and imprisonment.

Due service of the within Brief in Opposition to Petition for Certiorari is hereby acknowledged this_____day of April, A. D. 1938.

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_____

Counsel for Petitioners.

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IN THE

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OF THE

UNITED STATES.

October Term, 1938.

No. 21.

WILLIAM H. NEBLETT, *et al.*,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, *et al.*,

Respondents.

Supplement Correcting Record References in Brief of Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

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The respondents above named, early in September, filed a Suggestion of a Diminution of Record and Motion for Certiorari, noticing the same for hearing at the earliest opportunity, to-wit, Monday, October 3, 1938.

The hearing of the cause itself was set for Monday, October 17, 1938, and under the rules the brief of said respondents was required to be served and filed with the clerk of the above entitled court on or before Monday, October 10, 1938. The brief was printed and served in Los Angeles on Saturday, October 8th, and filed with the

clerk of the court at Washington on October 10, 1938. As stated in footnote 8 at page 25 of the brief, the motion for diminution was still pending and undetermined at the time the brief was printed, served and filed. Accordingly, said brief contains references to the supplement referred to in the suggested diminution.

Now that said motion has been denied, the following language appearing in the brief of said respondents finds no support in the record:

Pages 25 and 26. The first full paragraph on page 25 running over onto page 26.

Page 32. The concluding clause in the last sentence just preceding the first full paragraph numbered 3, reading as follows: "and such conveyance was actually made".

Page 34, line 7. The words "and the fact is".

Page 56. The sentence in the first full paragraph reading: "In fact, the Commissioner subsequent to the order of December 4, 1936, and prior to January 7, 1937, did execute a new conveyance to the New Company [Supp. R. fol. 101]."

Page 71. The first full paragraph, beginning "as a matter of fact".

Respectfully submitted,

T. B. COSGROVE,

JOHN N. CRAMER,

Counsel for Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.



Due service of the within Supplement Correcting Record References in Brief is hereby acknowledged this____day of October, A. D. 1938.

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Counsel for Petitioners.

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UNITED STATES.

October Term, 1938
No. 21

WM. H. NEBLETT, VERNON BETTIN, WILLIAM GEORGE DICKINSON and ALFRED F. MACDONALD,
Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, THE PACIFIC MUTUAL LIFE INSURANCE COMPANY, a corporation, GEORGE I. COCHRAN, *et al.*,
Respondents.

BRIEF OF RESPONDENT GEORGE I. COCHRAN.

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SUBJECT INDEX.

PAGE

I.

Opinions Below 1

II.

Statement of the Case 2

III.

Argument 4

Summary of the Argument 4

Point A. The Insurance Commissioner of California, in reorganizing the old company, acted without legislative authority 6

Point B. The contracts of the non-can policyholders have been impaired in violation of Article I, Section 10, of the Federal Constitution 16

Conclusion 24

Appendix—California Insurance Code sections cited in the brief.... 25

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Albert Life Ass. Co., In re, 39 L. J. Ch. 539	5, 23
Application of People by Van Schaick, 268 N. Y. S. 88	4, 9 11
Canada So. R. Co. v. Gebhard, 109 U. S. 527	5, 17
Doty v. Love, 295 U. S. 64	4, 14
Gilfillan v. Union Canal Co. of Pa., 109 U. S. 401, 403, 404	5, 18
Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398	4
Lovell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264, 273	5, 19
Matter of People (Title and Mortgage Guarantee Company of Buffalo), 190 N. E. 153	4
Northern P. R. Co. v. Minnesota, 208 U. S. 583	5, 21
Panama Refining Co. v. Ryan, 293 U. S. 388	4, 8, 9, 10
People by Van Schaick v. National Surety Company, 191 N. E. 521	4
Schechter v. United States, 295 U. S. 495	4, 8, 9, 10
Universal Life Insurance Co. v. Binford, 76 Va. 103	5, 23

STATUTES.

California Insurance Code, Sec. 1033	5, 21, 25
California Insurance Code, Sec. 1043	4, 5, 6, 7, 8, 11, 21, 25
California Statutes 1935, Chap. 145	5, 21
Insurance Code, Secs. 1010 to 1061	11

TEXT BOOKS AND ENCYCLOPEDIAS. PAGE

12 American Jurisprudence, Secs. 389-390.....5, 21
1 American Law Reports 598.....5, 16, 22
48 American Law Reports 107.....5, 23
107 American Law Reports 1233.....5, 23
12 Corpus Juris 850.....4
12 Corpus Juris 850, Sec. 336.....9
32 Corpus Juris 1039.....5
32 Corpus Juris, Sec. 102, pp. 1039-1040.....19
32 Corpus Juris 1051.....5, 16, 22
15 Fletcher, Cyclopedia Corporations, 491.....5, 17
5 Joyce on Insurance, Sec. 3596.....5, 23
14 Ruling Case Law 853.....5
14 Ruling Case Law 855.....5, 16, 19, 22



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Respondents.

BRIEF OF RESPONDENT GEORGE I. COCHRAN.

I.

Opinions Below.

The opinion of the Supreme Court of California is now officially reported.[1] It is printed in the record.[2] The oral opinion of the trial court is also printed in the record.[3]

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[1] 10 Cal. (2d) 307.
[2] R. 1509-1544.
[3] R. 1469-1506.

II.

Statement of the Case.

This respondent, George I. Cochran, with others intervened in the proceedings in the lower court in California at their inception.[4] Respondent was then the Chairman of the Board of Directors of The Pacific Mutual Life Insurance Company of California. Prior to July 22, 1936, and up until 1935, this respondent was the President of the company. The record does not show how many years respondent was President, but it will be admitted that he held that office for some thirty years. It appears generally throughout the record that the growth of the company was very rapid in the last several years during the time respondent was President.

Respondent is both a policyholder and a stockholder in The Pacific Mutual Life Insurance Company of California.[5] When the old company was reorganized, respondent was not named by the Insurance Commissioner as a director or officer of the reorganized company.

This brief is filed by respondent, as a respondent, since he appears as such in the petition for the writ of certiorari. As former President of the old company, for many years, and as the Chairman of its Board of Directors at the time of the reorganization by the Insurance Commissioner, respondent feels that there is a duty imposed upon him, not only to protect his own interests as a policyholder and stockholder, but also to protect the interests of

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[4] R. 233.
[5] R. 233.

all other policyholders and stockholders in the old company. He, therefore, files this brief on behalf of himself and all other policyholders and stockholders of the old company.

This respondent did not file a brief in opposition to the petition for the writ of certiorari. He read that petition and was in full agreement with it. Although this respondent agrees with the points and arguments contained in the brief filed in support of the petition for the writ of certiorari and the supplemental brief filed by the petitioners herein, he files this brief in order to bring to the attention of this court certain important questions and the bearing of the Constitution upon them which, in his view, are not fully developed in the briefs already on file. His discussion is limited to Points "G", "H" and "J", so designated in the brief filed in support of the petition for writ of certiorari.

Respondent George I. Cochran is a lawyer, being admitted to the Bar of California some fifty years ago and is still a member of that Bar in good standing. He is not admitted to practice before the Supreme Court of the United States and therefore files this brief *pro se*.

The statement of facts under the heading "A" in the petition for writ of certiorari is full and correct.[6] Relying upon that statement of facts and, in the interest of brevity, no further statement of the facts will be made here.

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[6]Petn. 4-11.

III.

ARGUMENT.

Summary of the Argument.

POINT A.

The Insurance Commissioner of California, in reorganizing The Pacific Mutual Life Insurance Company of California, acted without legislative authority. If he did not act without legislative authority, then the legislature has made an unlawful delegation of power to the Insurance Commissioner.

California Insurance Code, sec. 1043; *Schechter v. U. S.,* 295 U. S. 495; *Panama Refining Co. v. Ryan,* 293 U. S. 388; 12 *Corpus Juris* 850; *Application of People by Van Schaick,* 268 N. Y. S. 88; *People by Van Schaick v. National Surety Company,* 191 N. E. 521; *Matter of People (Title and Mortgage Guarantee Company of Buffalo),* 190 N. E. 153; *Home Building & Loan Assn. v. Blaisdell,* 290 U. S. 398; *Doty v. Love,* 295 U. S. 64.

Point B.

The contracts of the non-can policyholders have been impaired in violation of Article I, Section 10, of the Federal Constitution.

14 *R. C. L.* 855; 32 *Corpus Juris* 1051; 1 *A. L. R.* 598; 15 *Fletcher, Cyclopedia Corporations,* 491; *Canada So. R. Co. v. Gebhard,* 109 U. S. 527; *Lovell v. St. Louis Mutual Life Insurance Co.,* 111 U. S. 264; *Gilfillan v. Union Canal Co. of Pa.,* 109 U. S. 401; 14 *R. C. L.* 853; 32 *Corpus Juris* 1039; *California Insurance Code,* sec. 1043; *California Statutes* 1935, Chap. 145; *Northern P. R. Co. v. Minn.,* 208 U. S. 583; 12 *American Juris,* sec. 389; *California Insurance Code,* sec. 1033; *Universal Life Insurance Co. v. Binford,* 76 Va. 103; 5 *Joyce on Insurance,* sec. 3596; *In Re Albert Life Ass. Co.,* 39 L. J. Ch. 539; 48 *A. L. R.* 107; 107 *A. L. R.* 1233.

POINT A.

The Insurance Commissioner of California, in Reorganizing the Old Company, Acted Without Legislative Authority

The discussion under this point is limited to a discussion of Points "G" and "H", so designated in the brief filed in support of the petition for writ of certiorari.[7]

The reorganization or rehabilitation of The Pacific Mutual Life Insurance Company of California was accomplished by the Insurance Commissioner, an administrative officer, and the lower court,[8] under a statute which provided that the Insurance Commissioner might "enter into rehabilitation agreements".[9] These words, to "enter into rehabilitation agreements", are the only statutory authority for the course of conduct pursued by the Insurance Commissioner of California.

This respondent contends, as do petitioners, that in order for the Insurance Commissioner to interfere with the contractual rights of the policyholders of an insurance company, there first must be an express statutory authorization. In addition to the statutory authorization, the method of procedure of the Insurance Commissioner must also be provided for in the statute. Only the legislature may interfere with vested contract rights, and the legislature may only do so when it passes a valid law in

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[7]Petn. 48-51.

[8]The Superior Court of Los Angeles County.

[9]*California Insurance Code*, sec. 1043, Appendix p. 25. All California Code sections referred to in this brief are printed in the appendix.

the exercise of the police power. In the present case, it cannot be contradicted that the Insurance Commissioner adopted a plan, and the court approved a plan, which seriously interfered with the contractual rights of all the policyholders involved in the reorganization. There was no statutory authorization for this procedure, except as provided for in Section 1043 of the Insurance Code of California. The legislature, therefore, has made no provision in the statute for the reorganization of an insurance company, and has provided no plan whereby the contractual rights of the policyholders may be interfered with.

The Insurance Commissioner cannot take the place of the legislature. He is only an administrative officer. Carpenter, the Insurance Commissioner, was proceeding under a section of the Insurance Code of California[1] which gave him only the limited power to "enter into rehabilitation agreements". Under the guise of the meager legislative authority contained in that section,[2] he proposed a plan which interfered with the rights of all the policyholders of the insurance company, and in particular discriminated against the rights of the non-can policyholders. The lower court approved that plan.[3] So did the Supreme Court of California.[4]

Neither the court nor Carpenter could interfere with the rights of the policyholders of the Insurance Company without a valid act of the legislature providing that the

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[1]*California Insurance Code,* sec. 1043, Appendix p. 25.
[2]*California Insurance Code,* sec. 1043, Appendix p. 25.
[3]R. 1378-1395.
[4]R. 1509-1544.

Insurance Commissioner might propose, and the court approve, a plan which would discriminate or classify policyholders upon different bases. Only the legislature may thus exercise the police power, and the legislature has not so provided in Section 1043 of the Insurance Code of California or in any other section of that Code.

If it should be considered by this court that the vague words, to "enter into rehabilitation agreements", are a sufficient statutory authorization for the Insurance Commissioner to propose a plan of reorganization which discriminates between various classes of policyholders, then the legislature of California has unlawfully delegated its power to the Insurance Commissioner.

It is settled law in the United States that a legislature may not delegate its authority to prescribe the standards of legal obligation.[5] It is true, of course, that so long as a policy is laid down and a standard established by statute, no unconstitutional delegation of legislative power is involved.

But that was not what was done here. The legislature, instead of definitely acting within its police power and prescribing the standards relating to the reorganization of insolvent insurance companies, has set up no standards aside from the vague general statement of to "enter into rehabilitation agreements". In view of the scope of that broad declaration, and also in view of the fact that no

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[5] *Schechter v. U. S.*, 295 U. S. 495; *Panama Refining Co. v. Ryan*, 293 U. S. 388.

restrictions are imposed, the discretion of the Insurance Commissioner of California in thus enacting laws for the reorganization of insolvent insurance companies is virtually unfettered. The legislature must enact the laws. It has been held many times in the United States that:

> "Acts providing for the preparation by the insurance commissioners and the adoption of a 'standard policy' delegate legislative power and are unconstitutional."[6]

Therefore, the authority thus conferred by Section 1043 of the Insurance Code, if it is so conferred as held by the Supreme Court of California, is an unconstitutional delegation of legislative power.[7]

The Supreme Court of California in its opinion cited and relied upon the *National Surety Company* case of New York.[8] The Supreme Court of California further relied upon the affirmance of the *National Surety Company* case by the New York Court of Appeals in *People by Van Schaick v. National Surety Company.*[9] The affirmance of the *National Surety Company* case by the New York Court of Appeals is stated in the opinion of the Supreme Court of California to have been on the

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[6]12 *Corpus Juris* 850, sec. 336.

[7]*Schechter v. U. S.*, 295 U. S. 495; *Panama Refining Co. v. Ryan*, 293 U. S. 388.

[8]*Application of People by Van Schaick*, 268 N. Y. S. 88 R. 1535-1536.

[9]191 N. E. 521.

authority of *Matter of People (Title & Mortgage Guaranty Company of Buffalo)*.[1]

Contrary to the repeated statements of the Supreme Court of California[2] contained in its opinion, the Court of Appeals of New York has never squarely passed upon the validity of the proceedings had in the *National Surety Company* case. In the Appellate Division,[3] the court indicated that it was not considering the point of excessive delegation of power to the Superintendent of Insurance under the statutory authority to formulate plans of rehabilitation. The Court of Appeals confirmed the case on the purported authority of *Matter of People (Title & Mortgage Guaranty Co. of Buffalo)*.[4] That case, however, as appears from the report, was not at all concerned with the validity of the New York Insurance law but was concerned with the validity of the so-called Schackno Act relating to the reorganization of mortgage guarantee companies under a state law very similar to 77B of the Bankruptcy Act. The *National Surety Company* case was, of course, decided prior to the decisions of this court on the question of delegation of power.[5]

A further objection to the reorganization which took place in this case is that the California Insurance Code does not in terms or by implication purport to be a reorganization statute.

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[1]190 N. E. 153; R. 1536.

[2]R. 1535-1538.

[3]268 N. Y. S. 88.

[4]190 N. E. 153.

[5]*Schechter v. U. S.*, 295 U. S. 495; *Panama Refining Co. v. Ryan*, 293 U. S. 388.

The first paragraph of the opinion of the Supreme Court of California indicates that the proceedings were taken "* * * pursuant to the provisions of section 1043 of the Insurance Code."[6] The Supreme Court of California, in its opinion, further said: "* * * the proceedings here under review were taken under Sections 1010 to 1061 of the Insurance Code, adopted in 1935."[7]

There is nothing in any of these sections of the Code, or the Code as a whole, which deals with reorganization in the sense of either "deferred liquidation" or in the sense of modifying the contract rights of creditors.

Although the Court correctly stated that,

> "* * * several of the provisions contained therein in reference to the rehabilitation of insolvent insurance companies were new sections in this state, having been copied, substantially, from similar provisions in the New York insurance law,"[8]

the sections of the New York Insurance Law, upon the basis of which reorganizations in the true sense were permitted and held valid, are wholly missing from the California Code.

The case of *People by Van Schaick* (*National Surety Company* case)[9] deals with the subject of the New York reorganization statute as applied to insurance companies. In that case the court said that the Commissioner acted under Chapter 49 of the laws of 1933, and that that

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[6]R. 1516.
[7]R. 1532.
[8]R. 1532.
[9]268 N. Y. S. 88.

statute was a moratorium statute which authorized the Commissioner to:

> "make, rescind, alter and amend rules and regulations imposing any condition upon the conduct of the business of any insurer which may be necessary or desirable to maintain sound methods of insurance and to safeguard the interest of policyholders, beneficiaries and the public generally during such period (or emergency). Such rules may be inconsistent with existing law, and in such case it may supersede it."[1]

To the same effect see the *Title & Mortgage Guaranty Company* case.[2]

As a reorganization statute, the California Act would have been invalid unless it was based upon and asserted to be based upon emergency conditions. In *Home Building & Loan Assn. v. Blaisdell,* this court said:

> "This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community."[3]

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[1]268 N. Y. S. 88, 96.
[2]264 N. Y. 69.
[3]290 U. S. 398, 439.

The court also said:

> "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power * * * The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. (Citing cases.) The finding of the legislature and state court has support in the facts of which we take judicial notice (citing cases).
>
> In view of the nature of the contracts in question * * * the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions."[4]

In the instant case no emergency was declared to exist by the Legislature of California, nor was it asserted or found to exist by either the lower or Supreme Court.

Even if California had a moratorium statute, and even if it had been passed under a declared and recognized emergency, the action here taken would not have been valid because there is nothing in the record to show that the action was appropriate to an emergency, nor that the plan approved was a fair and reasonable exercise of emergency powers.

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[4]290 U. S. 398, 444, 445.

The Plan does not purport to be a temporary suspension of remedies or rights. It fixes them permanently. There is nothing in the plan or in the decision of the Supreme Court of California which justifies the discrimination between different classes of creditors, excepting only the bare assertion that the premiums paid by one class of policyholders were inadequate for the protection they were promised.

The statute does not purport to authorize or provide for a plan of deferred liquidation, such as was involved in *Doty v. Love*.[5] A comparison of the California Statute with the Mississippi statute involved in the case of *Doty v. Love* demonstrates this to be true.[6]

Nor can the plan adopted be said to come within the minimum requirements of deferred liquidation approved in the case of *Doty v. Love*.

In that case the statute expressly provided:

> "That this Act shall not be construed to give the Superintendent of Banks the right to diminish the assets of a closed bank to the prejudice of the depositors and creditors thereof, * * *."[7]

Not only is there no such provision in the California statute, but the approved plan of reorganization does diminish the assets of the old company to the prejudice of its creditors.

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[5]295 U. S. 64.

[6]*Doty v. Love*, 295 U. S. 64, 66, 67, 68—Footnote 1.

[7]295 U. S. 64, 66, 67, 68—Footnote 1.

In the instant case all, or substantially all, of the assets were turned over to the new company for the purpose of paying and protecting the rights of all creditors except those holding non-can policies, and permitting them to come under the reorganization without diminution of rights. Non-Can creditors were neither protected nor permitted to come in without a substantial reduction in their rights.

The plan is set forth in the approved Rehabilitation and Reinsurance Agreement,[8] and includes a provision for the establishment in the new company of a participating life insurance department. Certain assets of the company from among its general assets, subject to certain limitations, are declared to be "held absolutely for the security of and benefit of the policyholders of the participating department as though it belonged to a mutual company carrying on no other business."[9]

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[8]R. 1396-1444.

[9]R. 1408.

POINT B

The Contracts of the Non-Can Policyholders Have Been Impaired in Violation of Article I, Section 10, of the Federal Constitution.

This respondent's discussion under Point B is limited to Point "J" so designated in the brief filed in support of the Petition for Writ of Certiorari.

The contracts of the non-can policyholders have been unconstitutionally impaired under the terms of the Rehabilitation Plan. Their rights were scaled down, and the company was made solvent thereby (if ever actually insolvent), without any corresponding burden being imposed upon the other policyholders of the company. The entire burden of the reorganization was placed upon the holders of the non-can policies. Thus all policyholders of the company were not treated alike as they must be.[1]

> "But to a certain extent the majority stockholders are trustees for the minority and must exercise fairness and good faith in dealing with the assets involved in a reorganization. If they act in good faith their judgment cannot ordinarily be questioned by the minority. But they cannot, in breach of their trust, or in fraud of the rights of their stockholders, effect a reorganization in such a way as to acquire the corporate property and assets for them-

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[1] 14 *R. C. L.* 855, sec. 21; 32 *Corpus Juris* 1051, sec. 123; 1 A. L. R. 598.

It has been decided many times in the United States that the creditors of a corporation must be treated alike.

selves, thus excluding the minority from a fair participation in the fruits of the transaction."[2]

"There should be no discrimination between stockholders nor denial to them of equal rights of participation in the new company. * * *"[3]

The rule that stockholders may not discriminate against other stockholders would seem to be applicable to the policyholders of an insurance company. The life policyholders under the plan of reorganization were permitted by the court and the Insurance Commissioner to participate in the reorganization upon more favorable terms than the non-can policyholders. Respondent contends, as do the petitioners, that the non-can policyholders could not be thus discriminated against. The non-can policyholders were not given an opportunity to come into the reorganization on equal terms.

The plan of reorganization adopted by the Insurance Commissioner did not provide that a certain percentage of consenting policyholders could bind the non-consenting policyholders. In fact the plan does not require any percentage of consenters to bind the non-consenters. The record does not disclose what percentage of the policyholders of the old company consented to the plan of reorganization.

The percentage of consenters is immaterial in the light of the decision by this court in the case of *Canada So. R. Co. v. Gebhard*[4] where the court said:

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[2]15 *Fletcher, Cyclopedia Corporations,* 491-492, sec. 7296.

[3]15 *Fletcher, Cyclopedia Corporation,* 493, sec. 7296.

[4]109 U. S. 527, 535.

"In the absence of statutory authority * * * nothing can be done by a majority, however large, which will bind a minority without their consent."

See also:

Gilfillan v. Union Canal Co. of Pa., 109 U. S. 401, 403, 404.

Respondent respectfully calls to the attention of this court that the Insurance Code of California contains no provision whereby the Insurance Commissioner, or a majority of the policyholders, may bind dissenters.

It is true, as pointed out by the Supreme Court of California,[5] that the non-can policyholders did not have to accept the plan of rehabilitation and that they would be entitled to go into the liquidation proceedings and there prove the damages they had suffered from the breech of their contracts by the old company. The Supreme Court of the United States has announced the same rule, namely, that a dissenting policyholder is under no obligation to continue his insurance in the new company.[6] It is a stranger to him and, upon the breach of his policy of insurance by the insolvency of the company, his contract

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[5]R. 1538-1539.

[6]"Our second conclusion, that the complainant was under no obligation to continue his insurance in the new company, we think is equally clear. He had nothing to do with the company; it was a stranger to him. It is true that it received all the old Company's assets and assumed all its obligations on policies and otherwise; and the complainant was relegated to the new company for the obtainment of his rights, what-

is terminated[7] and he may hold the old company liable to him in damages.

Since the foregoing is true, the Insurance Commissioner and the court had to leave the dissenting non-can policyholder with the right to receive the liquidated value of his contract, which was breached by the insolvency of the company, without unreasonable delay.

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ever they were. But that was a transaction between the Companies themselves, with which he had nothing to do; and under such a total change of relations and parties, it would be most unreasonable that he should be compelled, against his will or with the alternative of abandoning all his rights, to continue all his life to fulfill an executory contract by the payment of premiums to a company to which he was a total stranger, and in which, perhaps, he reposed no confidence whatever, or to take a paid up policy in such company."

Lovell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264, 273.

[7] "While there are some contrary decisions, the weight of authority supports the proposition that on the judicial adjudication of the insolvency of a stock insurance company and the appointment of a receiver the outstanding policies of the company are *ipso facto* cancelled * * *."

14 R. C. L. 853, sec. 20.

"While there is authority to the contrary, the generally recognized rule is that a decree of dissolution or an adjudication of insolvency, coupled with the appointment of a receiver, cancels or terminates outstanding policies by operation of law * * *."

32 *Corpus Juris*, pp. 1039-1040, sec. 102.

The protection of the rights of the non-can policyholders in liquidation was not taken care of by the Insurance Commissioner under the plan of rehabilitation. While the plan of rehabilitation is drawn in contemplation of claims being filed against a liquidator in a liquidation proceeding, nevertheless it is specifically provided that the reserves which the new company is to set up under the plan against all policies, shall, with respect to the non-can policies, be only to the extent required after the reduction in the benefit.[8] The new company then agreed to pay to the liquidator, after the expiration of the time for filing claims, an amount equal only to the reserves so established. The plan further provides that if, after the determination of the amount of claims due dissenting policyholders, a further payment needs to be made from the new company to the liquidator, it shall be made only out of the funds available for general corporate purposes and under the terms of Paragraph XIV.[9] Therefore, there is on the face of the plan a very effectual limitation upon the funds which will be available to pay a dividend upon non-can claims, and the dissenting non-can policyholder will fare no better than an assenting non-can policyholder, so far as his eventual recovery is concerned.

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[8]R. 1421-1422.

[9]R. 1416-1419.

The section of the statute[1] under which the reorganization was said by the court to be impliedly authorized was enacted in 1935,[2] long after most of the non-can policies went into effect and after the non-can policies of petitioners went into effect.[3]

To construe the statute retroactively, so as to affect the contract rights of non-can policyholders then in existence, violates the contract clause of the Constitution of the United States.[4]

It should also be noted that the Insurance Code of California, under which this proceeding was had, contemplates an equality of distribution, in case of insolvency, to all unsecured creditors.[5]

As pointed out above, there was no equality of distribution provided for. Furthermore, the reserves provided for in the plan of rehabilitation for dissenting life policyholders, in case of liquidation, were greater than the reserves provided for dissenting non-can policyholders.[6] Neither the Insurance Commissioner nor the court could so discriminate between the policyholders of the company.

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[1]*California Insurance Code,* sec. 1043, Appendix p. 25.

[2]*California Statutes* 1935, Chapter 145, in effect September 15, 1935.

[3]R. 245; R. 626; R. 681; R. 990; R. 1233; R. 1274.

[4]*Northern P. R. Co. v. Minnesota,* 208 U. S. 583; 12 *American Juris.,* secs. 389-390.

[5]*California Insurance Code,* sec. 1033. Appendix p. 25.

[6]R. 1421-1422.

Upon what basis of law, justice, or equity is the one class entitled to priority over the other? The old company was insolvent, as found by the Insurance Commissioner and all the creditors of the company had to be treated alike.[7]

Respondent further wishes to point out that, prior to the plan of reorganization, the non-can policyholders had a vested right in case of insolvency to look to the entire assets of the old company for the satisfaction of their claims. Under the plan of reorganization, however, the rights of the non-can policyholders upon liquidation are limited to a special fund.[8]

From the foregoing analysis, it logically follows that the contracts of the non-can policyholders have been impaired. The special reserve of Twenty-three Million Dollars, was set up with respect to the non-can policies, as respondent understands it, because of inadequate premiums,

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[7]"In distributing the assets of an insolvent insurance company the general rule is that all creditors stand on an equal footing, and this rule applies as between holders of policies of all classes, matured and unmatured, * * *."

14 R. C. L. p. 855, sec. 21.

"In the distribution of the assets of an insolvent company, the general rule is that all creditors are entitled to share equally in its assets in proportion to their claims, subject to such equities as may be created by statute or by the charter and by-laws of the company."

32 *Corpus Juris,* 1051, sec. 123.

See also:

1 A. L. R. 598.

[8]R. 1421-1422.

and was the reason why the old company was declared insolvent by the Insurance Commissioner.[9] Consequently, upon liquidation, each policyholder should be entitled to prove as his damage the profit of his contract. It seems clear that, on non-can contracts, the individual policyholder should be entitled to have the profit of his contract measured by the difference in the low premium rate actually charged him under his policy, and the premium rate which was charged, or would be charged, if a comparable company were writing a comparable kind of policy.[1]

The sum total of the non-can claims for damages should, therefore, equal the aggregate reserve set up by the Insurance Commissioner, namely, Twenty-three Million Dollars. If, as a matter of law, non-can policyholders have the right to go into the liquidation proceeding and prove up their individual claims for damages, then the aggregate of these claims would be Twenty-three Million Dollars.

Now, if the reserve to take care of such non-can claims is set up on a limited basis, as provided for by Paragraph XVII of the plan,[2] and if the amount ultimately available is to come out of the corporate funds under the limitations contained in the plan, then the non-can policyholders have not been offered an alternative, as claimed by the Supreme Court of California.[3] They really were offered no alternative at all.

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[9]R. 31.

[1]*Universal Life Insurance Co. v. Binford*, 76 Va. 103; 5 *Joyce on Insurance*, sec. 3596; *In re Albert Life Ass. Co.*, 39 L. J. Ch. 539; 48 A. L. R. 107; 107 A. L. R. 1233.

[2]R. 1421-1424.

[3]R. 1539.

CONCLUSION.

Respondent George I. Cochran submits that the petitioners have presented a case which merits the attention of this court and shows a clear violation by the Insurance Commissioner and the courts of California, both of due process of law and of the impairment of the contract clause of the Federal Constitution.

It is respectfully urged by this respondent that this court reverse the decision of the Supreme Court of California.

Respectfully submitted,

GEORGE I. COCHRAN,
Pro se.
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APPENDIX.

California Insurance Code Sections Cited in the Brief.

CALIFORNIA INSURANCE CODE.

Sec. 1033:

1033. Claims allowed in a proceeding under this article shall be given preference in the following order:

1. Expense of administration; 2. Claims having preference by the laws of the United States and by the laws of this State; 3. All other claims.

Sec. 1043:

1043. In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, or enter into *rehabilitation agreements*. Such rehabilitation or reinsurance agreements shall provide that, subsequent to the date thereof and for such period of time as the commissioner may determine, no investment or reinvestment of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the commissioner.

(First Par. of sec. 1043 only. Italics ours.)

Due service of the within Brief is hereby acknowledged this.....day of September, A. D. 1938.

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_____

Attorneys for Petitioners.



INDEX.

Page.

Statement of Case 1
Argument 1

CASES CITED.

Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527, 3 S. Ct. 363 ..... 9, 10, 11
Coriell v. Morris White, Inc., 54 F. (2d) 255 10
Doty v. Love, 295 U. S. 64, 55 S. Ct. 558 4
Gates v. Boston & N. Y. Air-Line R. Co., 5 Atl. 695 9
Gilfillan v. Union Canal Co., 109 U. S. 401, 404, 3 S. Ct. 304 9
Home Building & Loan Assn. v. Blaisdell, et ux., 290 U. S. 398, 54 S. Ct. 231 3
Modern Woodmen of America v. Mixer, No. 308, 267 U. S. 544, 45 S. Ct. 389, 69 L. Ed. 783 9
National Surety Co. v. Coriell, 289 U. S. 426, 53 S. Ct. 678 ..... 6, 7
Northern P. R. Co. v. Minnesota, 208 U. S. 583, 28 S. Ct. 341 7
People v. Van Shaick (National Surety Company case), 268 N. Y. Supp. 88 2
Second Russian Ins. Co. v. Miller, 45 S. Ct. 593, 268 U. S. 552 10
Title & Mortgage Guaranty Company Case, 264 N. Y. 69 3

AUTHORITIES AND TEXT BOOKS CITED.

Sections 1033, 1034 California Insurance Code—Codes of California, 1937, Deering 7
American Jurisprudence, Vol. 12, Sections 389, 390 7
Harvard Law Review, volume 48, at page 1414 8

Supreme Court of the United States

October Term, 1938

No. 21.

WM. H. NEBLETT, et al.,

Petitioners,

vs.

SAMUEL L. CARPENTER, Jr., et al.,

Respondents.

BRIEF OF RESPONDENT DOUGLAS E. C. MOORE

STATEMENT OF CASE.

This respondent, Douglas E. C. Moore, with others, intervened in the proceedings in the lower court in California at their inception (R. p. 233). Respondent was a stockholder of the old company and a member of its board at the time the intervening petition, to which this respondent was a party, was filed (R. p. 233). The intervening petition referred to directly raised the issue of due process of law and impairment of contract rights under the Constitution of the United States (R. p. 242).

The brief is limited to a discussion of points "G" and "J", so designated in the petition for writ of certiorari.

ARGUMENT.

"The power to reorganize cannot be implied from the right of the Commissioner as Conservator to enter into rehabilitation agreements" (Point G, petitioner brief).

The California statute, under which the reorganization here was effected, does not in terms purport to be a reorganization statute.

The first paragraph of the opinion of the Supreme Court of California indicates that the proceedings were taken

> "pursuant to the provisions of Section 1043 of the Insurance Code",

a copy of which will be found at page 64 of the petition for writ of certiorari.

The Supreme Court of California, in its opinion, said:

> "The proceedings here under review were taken under Sections 1010 to 1061 of the Insurance Code adopted in 1935" (See page 1532 of Record).

There is nothing in any of these sections of the Code, or the Code as a whole, which deals with reorganization in the sense of either "deferred liquidation" or in the sense of modifying the contract rights of creditors.

Although the Court correctly stated, that the

> "Several of the provisions contained therein in reference to the rehabilitation of insolvent insurance companies were new sections in this state, having been copied substantially from similar provisions in the New York Insurance Law."

the sections of the New York Insurance law, upon the basis of which reorganizations in the true sense were permitted and held valid, are wholly missing from the California Code.

The case of People v. Van Shaick (National Surety Company case), 268 N. Y. Supp. 88, deals with the subject of the New York reorganization statute as applied to insurance companies. In that case the court said (page 98) that the commission acted under chapter 40 of the

Laws of 1933, and that that statute was a moratorium statute which authorized the commissioner to:

> "make, rescind, alter and amend rules and regulations imposing any condition upon the conduct of the business of any insurer which may be necessary or desirable to maintain sound methods of insurance and to safeguard the interest of policyholders, beneficiaries and the public generally during such period (of emergency). Such rules may be inconsistent with existing law, and in such case it may supersede it."

To the same effect see Title & Mortgage Guaranty Company case, 264 N. Y. 69.

As a reorganization statute, the California Act would have been invalid unless it was based upon and asserted to be based upon emergency conditions.

See Home Building & Loan Assn. v. Blaisdell, et ux., 290 U. S. 398, 54 S. Ct. 231, where the court said, at page 240:

> "This principal precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community."

At page 242 the court said:

> "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power * * *. The declarations of the existence of this emergency by the Legislature and by the Supreme Court of Minnesota cannot be regarded as a subterfuge or as lacking in adequate basis. The finding of the Legislature and state court has support in the facts of which we take judicial notice * * *. In view of the nature of the contracts in question * * * the relief afforded and justified by the

> emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions."

In the instant case no emergency was declared by the Legislature to exist, nor was it asserted or found by the Court.

Even if California had a moratorium statute, and even if it had been passed under a declared and recognized emergency, the action here taken would not have been valid because there is nothing in the record to show that the action was appropriate to an emergency, nor that the plan approved was a fair and reasonable exercise of emergency powers.

The plan does not purport to be a temporary suspension of remedies or rights. It fixes them permanently. There is nothing in the plan or in the decision which justifies the discrimination between different classes of creditors, excepting only the bare assertion that the premiums paid by one class of policyholders was inadequate for the protection they were promised.

The statute does not purport to authorize or provide for a plan of deferred liquidation, such as was involved in Doty v. Love, 295 U. S. 64, 55 S. Ct. 558.

A comparison of the California statute with the Mississippi statute involved in the case of Doty v. Love demonstrates this to be true.

Nor can the plan adopted be said to come within the minimum requirements of deferred liquidation approved in the case of Doty v. Love.

In that case the statute expressly provided:

> "This Act shall not be construed to give the Superintendent of Banks the right to diminish the assets of a closed bank to the prejudice of the depositors and creditors thereof."

Not only is there no such provision in the California statute, but the approved plan of reorganization does diminish the assets of the old company to the prejudice of its creditors.

In the instant case, all or substantially all of the assets were turned over to the new company for the purpose of paying and protecting the rights of all creditors except those holding non-can. policies, and permitting them to come under the reorganization without diminution of rights. Non-can. creditors were neither protected nor permitted to come in without substantial reduction in their rights.

The plan is set forth in the approved Rehabilitation and Reinsurance Agreement, found at Record page 1396, which includes a provision for the establishment in the new company of a participating life insurance department. Certain assets of the company from among its general assets, subject to certain limitations, are declared to be "held absolutely for the security of and benefit of the policyholders of the participating department as though it belonged to a mutual company carrying on no other business" (f. 4223, R. p. 1408).

Point J.—"The contracts of the petitioner and all other policyholders have been impaired in violation of Article 1, Section 10 of the Federal Constitution."

Our discussion of this point is limited to the rights of holders of non-can. policies.

There is no finding that the non-can. policyholders who dissent from the plan of reorganization, will receive payment in full for the damages they have suffered, nor that they will receive as large a percentage of their claims as

they would have received upon liquidation, nor that they will receive the same without unreasonable delay.

See National Surety Co. v. Corlell, 289 U. S. 426, 53 S. Ct. 678.

The appeal to the California Supreme Court rested in part upon the claim that the judgment roll discloses "that it was not preceded by findings of fact and conclusions of law". (Quotation from opinion of California court, at page 1529 of Record.) The fact that there were no findings is manifest from the record. The court's answer was twofold: (1) "The properly authenticated record does not disclose that findings were not waived" (R. p. 1529). The court refused to accept an affidavit by Neblett to the effect that findings were demanded and refused (R. p. 1530). The court's second answer was that "the proceeding here involved is a special proceeding in which findings are not required" (R. p. 1530). In this connection the court said:

> "The Commissioner was not prosecuting an action 'for the enforcement or protection of a right', or for the 'redress or prevention of a wrong', or for the 'punishment of a public offense' * * *. The proceeding is not one in which another party is prosecuting another party at all. It is simply a proceeding in which the state is invoking its power over a corporate entity permitted by the state to engage in a business vitally affected with the public interest upon condition of continuing compliance with the requirements provided by the state. It is not a controversy between private parties but a proceeding by the state in the interest of the public" (R. p. 1531).

The section of the statute under which the reorganization was said to be impliedly authorized was enacted in 1935, long after most of the non-can. policies went into

effect. To construe that statute retroactively so as to affect the contract rights of the non-can. policyholders then in existence violates the contract clause of the Constitution.

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 28 S. Ct. 341.

American Jurisprudence, Vol. 12, Sections 389, 390.

The insurance code of California under which these proceedings were had, contemplates an equality of distribution, in case of insolvency, to all unsecured creditors. Section 1033, California Insurance Code—Codes of California, 1937, Deering.

Section 1034 of the same Code contemplates the recovery by the commissioner of preferences.

The care which is required in nonadversary proceedings to obtain the approval of the Supreme Court in reorganization matters is indicated in the case of National Surety Co. v. Coriell, above referred to. Many of the conditions there set forth on the basis of which that case was reversed are patently present here. In that case the court said (681):

> "The nonassenting creditors were entitled to have the plan and their objections considered in an orderly way, and to a decree based on adequate data."

There is nothing in the record to show that this was done here.

> "There was no evidence on which the court could have found even that a majority of the unsecured creditors favored the plan."

The same is true here.

> "There was no valuation of the assets by a disinterested appraiser."

There is no showing that that was done here.

"The failure to require relevant data before deciding whether the plan should be approved was not cured by the declaration of the Circuit Court of Appeals that the dissenting creditors were entitled to an aliquot share of what, a year later, might be estimated the property would have brought at a public sale."

Even that much is not proposed here. On the contrary, the preference in favor of certain creditors is made final.

"The proceeding was not an adversary one" (p. 682).

The same is true here.

"The jurisdiction rested wholly upon the consent of the defendant corporation."

The same is true here.

Although both the Supreme Court and the trial Court in California found that the plan was fair and equitable, there is nothing whatsoever in either decision to show that sufficient facts were developed in this proceeding, said to be "not a controversy between private parties" so that this Court can, as it will insist upon doing, determine that no constitutional rights have been violated. This it must do unless it were to rest upon mere conclusions without any showing of facts.

The entire matter of binding dissenters under state reorganization laws is in the process of formation, and to permit rights of dissenters to be ignored or concealed under presumptions and mere rules of practice, and not on the basis of substantive evidence, would be the last straw in breaking down constitutional safeguards. See discussion in note in Harvard Law Review, volume 48, commencing at page 1414.

No State legislature has any reserve power to legalize a plan of reorganization of an insurance company, except it be done pursuant to so-called emergency legislation. See Gilfillan v. Union Canal Co., 109 U. S. 401, 404, 3 S. Ct. 304; Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527, 3 S. Ct. 363.

In the Gebhard case they were dealing with a reorganization pursuant to Canadian law, valid in Canada, and the issue was as to its extraterritorial effect in this country. The Gebhard case laid down the doctrine, recently affirmed by this court (Modern Woodmen of America v. Mixer, No. 308, 267 U. S. 544, 45 S. Ct. 389, 69 L. Ed. 783),

> "that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property."

The Gebhard case is distinguishable from the Pacific Mutual case in the following respects: in the Gebhard case the rights of the bondholders were limited by the express provision of the bond and the mortgage, by the peculiar nature and character of the security, and by the laws of Canada under which the bonds were issued. See Gates v. Boston & N. Y. Air-Line R. Co., 5 Atl. 695, which discusses these distinctions. There was nothing to deny, and in fact to the contrary it appeared, that in the Gebhard case the corporation was paying its debts to the extent of its financial ability. It was not made to appear in the Pacific Mutual case that the corporation was providing for its non-can. policyholders to the extent of its financial ability. In this connection, see

Coriell v. Morris White, Inc., 54 F. (2d) 255, where the court said:

> "A scheme for the reorganization of a corporation which does not provide for the payment of its debts to the extent of its financial ability, impairs the obligation of the contract by which credit was extended to it."

For this court's own interpretation and restriction upon the construction of the Gebhard case, see Second Russian Ins. Co. v. Miller, 45 S. Ct. 593, 268 U. S. 552.

The rule in the Gebhard case has never been applied to a situation such as is here involved, and its application was limited by the peculiar facts in that case, among which may be cited the following statements from the opinion. The court said at page 368 of the opinion in 3 Supreme Court Reporter:

> "In the absence of statutory authority, or some provision in the instrument which establishes the trust, nothing can be done by a majority, however large, which will bind a minority without their consent."

The court then proceeds to point out that in the Gebhard case there was legislative power:

> "for binding the minority in a reasonable way by the will of the majority."

The court then proceeds to point out that in the Gebhard case there was involved a corporation which was created for a public purpose; that it had its corporate home in Canada, subject to the exclusive legislative authority of the Dominion parliament. When the bondholders bought their bonds they were, in legal effect, informed that they were entering into contract relations, not only with a foreign corporation, but with the holders of other bonds of the same series, who were relying

equally with themselves for their ultimate security on a mortgage of property devoted to a public use, situated entirely within the territory of a foreign government.

The court said further:

> "It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere. * * * It is not in conflict with the constitution of the United States, which, although prohibiting states from passing laws impairing the obligation of contracts, allows congress 'to establish * * * uniform laws on the subject of bankruptcy throughout the United State'." (pp. 370, 371).

Since the non-can. policies were issued in this case the law in this country has been developed so as to justify what would otherwise amount to an impairment of contract rights, when an emergency exists, and is declared by competent authority. That is the only exception to the rule which protected these policyholders against impairment of their contract rights.

That rule, as above pointed out, does not apply to this case. The doctrine of the Gebhard case is limited in its application and does not extend to the facts in this case.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938.

No. 21.

WM. H. NEBLETT, et al.,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR.,

Respondents.

Brief on Behalf of Respondents, Hall and McManus, Intervenors for Themselves and All Other Holders of Non-cancellable Income Policies of the Pacific Mutual Life Insurance Company of California.

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SUBJECT INDEX.

PAGE

Preliminary statement 1

The reorganization agreement places the entire risk of future loss on the non-can policyholders 4

The court should preserve the reorganized corporation but order the creation of a horizontal lien to equalize the loss 4

Conclusion 5

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Benjamin v. Mutual Life, 146 Cal. p. 34 4

Carpenter v. The Pacific Mutual Life Ins. Co., 94 Cal. Dec. 681 2

Central Pennsylvania Nat'l Bank v. N. J. Fidelity Plate Glass Co. (N. J.) 177 Atl. 441 4

STATUTES.

California Code of Civil Procedure, Sec. 382 1

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938.

No. 21.

WM. H. NEBLETT, et al.,

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vs.

SAMUEL L. CARPENTER, JR.,

Respondents.

Brief on Behalf of Respondents, Hall and McManus, Intervenors for Themselves and All Other Holders of Non-cancellable Income Policies of the Pacific Mutual Life Insurance Company of California.

Preliminary Statement.

On or about August 5, 1936, by an order duly made pursuant to section 382 of the California Code of Civil Procedure, the court of first instance, upon the petition of respondents Hall and McManus, holders of non-cancellable income policies, ordered that they be and they were given leave to intervene in the original proceeding on behalf of themselves and of all holders of non-cancel-

lable income policies issued by the old company. Their answers are set forth at pages 773-782 and pages 914-989 of the printed record.

The writer was retained as their attorney and bore a laboring oar on the trial in the court of first instance and these respondents adopted as their proposal the "Giannini" Plan, so-called, and strongly urged its adoption. It furnished about $12,000,000 of new money but was rejected by the commissioner in favor of his own plan.

These respondents beg leave to join in the brief of the respondent George I. Cochran, but desire to add a brief memorandum.

I.

The commissioner urges that under the Insurance Code he is made trustee for all classes of policyholders and that he, with the court's approval, had the right under the same statute to himself determine what these conflicting interests should receive upon the reorganization. A trustee for opposing interests is in a difficult situation.

The court below evidently agreed with his contention and said that the constitutional rights of policyholders otherwise inviolable must bow to the reasonable exercise of the state's police power.[1]

It is submitted that the public is not at all concerned in the question of whether a life policyholder who provides

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[1] *Carpenter v. The Pacific Mutual Life Ins. Co.*, 94 Cal. Dec. 681 at page 696.

for his family in the event of his death or a non-can policyholder who provides for his family in the event of his disability comes off best in the reorganization of a life insurance company; this is a purely private affair between individual litigants whether those litigants are two in number or fifty thousand.

It is no longer necessary to burn a house down to roast a pig. In lieu of the elaborate machinery of a section 77b, there is substituted the simple expedient of vesting in an administrative officer the right to make a rehabilitation agreement with himself, not subject to the court's control and direction, but its bare right to approve or disapprove the agreement as made.

But the court below urges (page 700) that an estoppel arises as to those who assent to the agreement and those who dissent may file claims. The test of reasonableness and of discrimination in a reorganization would thus be excluded.

Thus is the ancient control of a Court of Equity over a reorganization dispensed with, and the rights of security holders made dependent on the ukase of an administrative officer. No right to reorganize is vouchsafed by the statute either to the shareholders or the policyholders, nor are the consents of any of them required.

II.

The Reorganization Agreement Places the Entire Risk of Future Loss on the Non-Can Policyholders.

By walling off the share of the assets applicable to life insurance reserves, the $3,000,000.00 of capital and surplus of the new company, placed at the hazard of the future, is taken entirely out of the reserves otherwise applicable to the non-can policies. In the event of future insolvency the loss would fall entirely upon the non-can policyholders.[2]

III.

The Court Should Preserve the Reorganized Corporation but Order the Creation of a Horizontal Lien to Equalize the Loss.

Confusion and loss would result from completely upsetting the reorganization, especially in view of the new business it has undertaken.

The court is contemplating a *fait accompli*. It is submitted that the best result could be obtained by placing a horizontal lien upon all old policies to equalize the loss sustained.

---

[2]*Cf. Central Pennsylvania Nat'l Bank v. N. J. Fidelity Plate Glass Co.* (N. J.) 177 Atl. 441. *Benjamin v. Mutual Life* (1905) 146 Cal. at p. 34.

Conclusion.

It is respectfully submitted that the decree below be modified to the extent suggested.

Respectfully submitted,

H. S. DOTTENHEIM,

Counsel for Respondents Above Named.

Due service of the within Brief is hereby acknowledged this.....day of October, A. D. 1938.

_____

_____

Counsel for Petitioners.

SUPREME COURT
OF THE
United States

October Term, 1938
No. 21

WILLIAM B. RANSOME, *et al.*,

Petitioners,

vs.

SAMUEL L. CARSTENS, Jr., Insurance Commissioner of the State of California, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

Brief of Respondents, Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

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SUBJECT INDEX.

PAGE

References Required by Rules 12 and 27 1

Prefatory Statement 3

Statement of Facts 6

The Issues Involved 27

Summary of the Argument 31

Argument 37

I.

The State Supreme Court decided that the Superior Court had jurisdiction and expressly determined that the Commissioner's application for his appointment as conservator was sufficient in substance to vest the trial court with jurisdiction. This holding is binding on this court for it is purely a matter of state law. In any event, the petitioners' contention is without merit 37

II.

The orders made by Judge Willis are valid and do not depend upon void orders made by Judge Edmonds. Judge Willis could and did validly ratify the acts of the Commissioner including his conveyance to the New Company on July 22, 1936. The Superior Court obtained jurisdiction upon the filing of the Commissioner's application for appointment as conservator and the appearance of the Old Company. The fact that a disqualified judge purported to act on said application did not divest the Superior Court of jurisdiction 46

PAGE

III.

The Commissioner was authorized during conservation proceedings to operate the business of the Old Company through a corporate instrumentality, the New Company. The State Court's decision to this effect does not violate the due process clause of the Federal Constitution. Petitioners' contention that error was committed in this regard fails to present a federal question; neither are petitioners aggrieved thereby..... 57

IV.

The asserted error of the State Supreme Court in construing the State Insurance Code so as to permit the rehabilitation of the business of an insolvent insurance company by means of a new company does not present a federal question..... 60

V.

The language of section 1043 of the Insurance Code of California providing that the Commissioner as conservator or liquidator, subject to the approval of the court, may enter into rehabilitation agreements is not vague or uncertain and the section is constitutional..... 61

VI.

The business of insurance is affected with a public interest. The State has an interest in the rehabilitation of insolvent insurance companies and may protect and advance that interest through the exercise of the police power..... 64

PAGE

VII.

The revised plan of rehabilitation and reinsurance and the order approving the same do not impair petitioners' contracts, deny them due process of law, nor deny them the equal protection of the law..... 67

A. The alleged non-existence of a liquidator did not impair petitioners' contracts nor deny them the equal protection of the law..... 68

B. Petitioners' contracts have not been impaired..... 73

1. Petitioners have no vested right in any form of remedy nor to insist on liquidation instead of rehabilitation. All they are entitled to is the equivalent of what they would have received on liquidation..... 73

2. As the appeals were taken on the judgment roll and no evidence is brought up, it must be presumed that assets held by the Commissioner will be sufficient to pay the dissenters as much as, or more than, they would have received on liquidation..... 74

3. If it be assumed that assets presently payable or deliverable to the Commissioner for the benefit of dissenters are not sufficient to pay to dissenters the amount they would have received on liquidation, the most that can be said is that some small portion thereof has been placed at the risk of the business of the New Company for the dissenters' own benefit, and this is not unconstitutional..... 77

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69-83

222

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PAGE

C. The approved plan did not deny to petitioners due process of law. It was not unjustly or unlawfully discriminatory 81

1. The problems presented to the Commissioner and the objectives which ought to be his goal..... 81

2. The Commissioner had three possible solutions: (a) complete liquidation (which would be disastrous); (b) ratable assumption of all policies (which would destroy intangible assets and would merely amount to deferred liquidation); and (c) a plan of rehabilitation by which the intangible assets and the profitable business of the Old Company would be preserved for the benefit of all creditors..... 83

3. The Commissioner submitted, and the California courts approved, the revised plan of rehabilitation whereby liquidation (either immediate or deferred) was avoided, and the intangible assets and profitable business preserved for the benefit of all policyholders, particularly the holders of non-can policies. The difference in treatment between non-can policyholders and other policyholders was necessary, fair and just and there was no unlawful or unconstitutional discrimination against them..... 87

VIII.

Apart from the benefits secured to the non-can policyholders and dissenters of all classes, the plan was entirely equitable. The decided cases show a pronounced trend toward the broad, equitable principle that policyholders in each class have a preferred claim to the reserves behind their policies, over the rights of the policyholders of any other class. The court should not hesitate to apply this principle to the situation in the case at bar..... 92

PAGE

IX.

Similar proceedings have been upheld in other jurisdictions..... 99

X.

It is too late for petitioners to urge, as they do in their supplemental brief, that section 1011 of the Insurance Code is unconstitutional. In any event their contentions in that regard are without merit..... 104

XI.

Reply to brief filed by respondent George I. Cochran..... 109

Conclusion..... 115

INDEX TO APPENDIX.

PAGE

California Insurance Code (1935), Secs. 1011, 1012, 1013, 1015, 1019, 1043 and 1057..... 2, 3, 4, 5

Civil Code of California, Secs. 2252, 3537..... 1

Code of Civil Procedure, Sec. 416..... 1

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300	55
Alexander v. Cosden Co., 290 U. S. 484	109
Anglo California Trust Co. v. Oakland Railway, 193 Cal. 451	5
Antonelle v. City Hall Comm'rs, 92 Cal. 228	5
Application of People, by Van Schaick, 239 App. Div. 490, 268 N. Y. S. 88, aff'd 264 N. Y. 473, 191 N. E. 521	63
Arguello, In re, 85 Cal. 151	44
Bank of Italy v. Johnson, 200 Cal. 1	70
Brinkerhoff-Faris Trust & Savings Bank v. Hill, 291 U. S. 673	29
Bushnell v. Leland, 164 U. S. 684	107
Carpenter v. The Pacific Mutual Life Insurance Company of California, 10 Cal. (2d) 307, 74 Pac. (2d) 761	1
Christensen v. Merchants & Marine Bank of Pascagoula, 168 Miss. 43, 150 So. 375	80
Clark v. Willard, 294 U. S. 211	105
Clary v. Hoagland, 6 Cal. 685	38
Cline v. Frink Dairy Co., 274 U. S. 445	61
Connally v. General Construction Co., 269 U. S. 385	61
Crowell v. Benson, 285 U. S. 22	111
Cummings v. Howard, 63 Cal. 503	5
Dahnke-Walker Co. v. Bondurant, 257 U. S. 282	108
Daman v. Hunt, 47 Cal. App. 274	45
Daniel v. Terrell (Texas), 93 S. W. (2d) 372	66
Dohany v. Rogers, 281 U. S. 362	37
Doty v. Love, 295 U. S. 64	37, 73, 78, 80, 103
Dreyer v. Illinois, 187 U. S. 71	111
East Tennessee V. & G. R. Co. v. So. Tel. Co., 112 U. S. 306	45
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817	41, 58
Fairbanks Shovel Co. v. Wills, 240 U. S. 642	55

PAGE

German Alliance Insurance Co. v. Kansas, 233 U. S. 389..... 64
Gibbes v. Zimmerman, 290 U. S. 326..... 73
Gray v. Gray, 185 Cal. 598..... 5
Hartford Life Insurance Co. v. Ibs, 237 U. S. 662.....102
Henricks v. Metropolitan Life Insurance Company, 7 Cal. (2d) 619..... 94
Hentschel v. Fidelity & Deposit Company of Maryland, 87 Fed. (2d) 833..... 58
Hession, In re (C. C. A. 7th), 97 Fed. (2d) 902..... 76
Heydenfeldt, Estate of, 127 Cal. 456..... 44
Highland Farms Dairy v. Agnew, 300 U. S. 608.....58, 111
Hilmer v. Superior Court, 220 Cal. 71..... 70
Hiscock v. Varick Bank of New York, 206 U. S. 28..... 55
Hochheimer v. Superior Court, 65 Cal. App. 206..... 38
Hutchins v. The Pacific Mutual Life Insurance Company of California, 97 Fed. (2d) 58.....40, 41
Inter-Southern Life Ins. Co. v. Omer (Ky.), 38 S. W. (2d) 931 94
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571.....108
Keeling Collection Agency v. McKeever, 209 Cal. 625..... 5
Koontz v. Northern Bank, 16 Wall. 196..... 55
Levezey v. Gorgas (Pa.), 4 Dall. 71..... 58
Lindsay-Strathmore Irrigation District v. Superior Court, 182 Cal. 315..... 52
Lion Bonding Company v. Karatz, 262 U. S. 77..... 51
Llewellin, In re (C. C. A. 7th), 86 Fed. (2d) 588..... 76
Maryland Casualty Company v. United States, 251 U. S. 342.... 94
Mitchell v. Taylor, 3 Cal. (2d) 217..... 65
Morgan v. United States (first appeal), 298 U. S. 468; (second appeal), 58 S. Ct. 773; (on rehearing), 58 S. Ct. 999.....104, 107
Murray v. American Surety Co., 70 Fed. 341..... 44
National Surety Corp. v. Nantz, 90 S. W. (2d) 385.....102

PAGE

National Surety Company, Re, 268 N. Y. S. 88, 191 N. E. 521 ..... 99, 101

New York Life Insurance Co. v. Statham, 93 U. S. 24 ..... 92, 93

Nielsen v. Provident Savings Life Assurance Society of New York, 139 Cal. 332 93

North Laramie Land Co. v. Hoffman, 268 U. S. 276 ..... 41, 58, 60

Northern Pacific R. Co. v. Boyd, 228 U. S. 482 80

O'Gorman and Young v. Hartford Fire Ins. Co., 282 U. S. 251 ..... 66, 76

Pacific Dry Goods Co. v. Superior Court, 9 Cal. App. (2d) 707 38

Pacific Investment Co. v. Ross, 131 Cal. 8 5

Panama Pacific Refining Company v. Ryan, 293 U. S. 388 58

Pavilion Ice [redacted] v. O'Brien, 60 Cal. App. 185 5

Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189 51

People v. Bank of San Luis Obispo, 154 Cal. 194 44

People v. Title & Mortgage Guarantee Co. of Buffalo, 190 N. E. 153 ..... 99, 101

Phillips v. Commissioner, 283 U. S. 589 108

Quong Ham Wah Co. v. Industrial Commission, 255 U. S. 445 .. 60

Rhine v. New York Life Insurance Co., 273 N. Y. 1, 6 N. E. (2d) 74, affirming 248 App. Div. 120, 289 N. Y. S. 117 ... 95, 97

Richardson v. Butler, 82 Cal. 174 44

Rubin v. Metropolitan Life Insurance Co., 251 App. Div. 382, 296 N. Y. S. 908, affirmed 278 N. Y. 155, 16 N. E. (2d) 293 95

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860 ..... 41, 58

Schecter v. United States, 295 U. S. 445 38

Scrimsher v. Reliance Rock Co., 1 Cal. App. (2d) 382 38

Shindelar v. Hadacheck, 88 Cal. App. 319 5

Small Co. v. American Sugar Refining Co., 267 U. S. 233 62

PAGE

Smith v. Westerfield, 88 Cal. 374.....38, 45
Standard Chemicals & Metals Corp. v. Waugh Chemical Corp., 231 N. Y. 51, 14 A. L. R. 1054..... 62
Standard Oil Co. v. Missouri, 224 U. S. 270..... 38
Thrower v. Kistler, 14 Fed. Supp. 217.....86, 103
Times-Mirror Co. v. Superior Court, 3 Cal. (2d) 309..... 98
Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. (2d) 489.....52, 53
United States v. Anderson, 194 U. S. 394..... 56
U. S. Life Insurance Co. v. Spinks (Sup. Ct. of Ky.), 96 S. W. 889..... 92

STATUTES.

Civil Code of California, Sec. 2252..... 69
Civil Code of California, Sec. 3537..... 49
Code of Civil Procedure of California, Sec. 416..... 51
Insurance Code of the State of California (1935), Secs. 1010 to 1061 (Ch. 145 as amended by Ch. 291; Stats. 1935, p. 500).....1, 62, 66, 73
Insurance Code, Sec. 1011....28, 36, 40, 41, 42, 44, 69, 105, 106, 108
Insurance Code, Sec. 1012.....36, 105, 106
Insurance Code, Sec. 1013.....39, 40
Insurance Code, Sec. 1015..... 39
Insurance Code, Sec. 1016..... 69
Insurance Code, Sec. 1019..... 55
Insurance Code, Sec. 1035..... 57
Insurance Code, Sec. 1043.....28, 33, 61, 62, 63, 110
Insurance Code, Sec. 1057.....69, 74, 108
Judicial Code, Sec. 237(b), as amended by Act of February 13, 1925, Ch. 229, 43 Stat. 936..... 1
28 United States Code, Sec. 344(b)..... 1
United States Constitution, Art. I, Sec. 10.....1, 79
United States Constitution, Fourteenth Amendment, Sec. 1.....1, 79

TEXT-BOOK.

21 California Jurisprudence, 15..... 42

References Required by Rules 12 and 27.

Opinions Below:

Carpenter v. The Pacific Mutual Life Insurance Company of California, 10 Cal. (2d) 307, 74 P. (2d) 761 [R. 1509-1544].

Although not a part of the record, the oral opinion of the Superior Court of Los Angeles County (the trial court) was transcribed and printed. [R. 1469 *et seq.*]

Jurisdictional Authority:

Judicial Code, Sec. 237(b), as amended by Act of February 13, 1925, Ch. 229, 43 Stat. 936; U. S. C., Title 28, Sec. 344 (b).

Statutes Involved:

Insurance Code of the State of California (1935), Secs. 1010 to 1061 (Ch. 145 as amended by Ch. 291: Stats. 1935, p. 500, at pp. 540-553);

U. S. Constitution, Art. I, Sec. 10;

Sec. 1 of Fourteenth Amendment to U. S. Constitution.

(Pertinent sections of Insurance Code will be found in the appendix hereto.)

Date of Judgment, etc.:

The order in the trial court was made and given December 4, 1936, and was entered December 7, 1936 [R. 1378-1444].

The judgment of affirmance by the state Supreme Court was made and given December 7, 1937. [R. 1509.] A rehearing was denied January 6, 1938. [R. 1545.]

Petition for certiorari was filed April 2, 1938, and granted May 16, 1938 (304 U. S. .....; 58 S. Ct. 1039 [R. 1546]).

Nature of the Case, Rulings, etc.:

On July 22, 1936, respondent, The Pacific Mutual Life Insurance Company of California, was insolvent within the meaning of the Insurance Code and its business was then in a hazardous condition. Upon the application of the Commissioner an order was made by a judge later discovered to be disqualified, appointing the Commissioner conservator. Thereupon he took possession of the assets of said corporation. On the same day on successive applications the same judge appointed the Commissioner liquidator of said corporation and approved a plan of rehabilitation authorizing a sale of substantially all of the assets of said corporation to a new company formed by the Commissioner for that purpose. Shortly thereafter it was discovered that the said orders were void because of the disqualification of the trial judge. Thereupon the Commissioner was appointed conservator *de novo* by a qualified judge and continued to carry on the business of the Old Company through his corporate instrumentality, the New Company. Some weeks later after extended conferences, held at the instance of the trial court, at which numerous parties and their attorneys were present, the Commissioner submitted a revised plan which, after a six-weeks trial, was on December 4, 1936, approved by a qualified judge who ratified and approved all of the Commissioners's acts and authorized the execution and full performance of the revised "Rehabilitation and Reinsurance Agreement" [R. 1396-1444].

Of the numerous policyholders and other persons interested who had appeared at the trial only *four* policyholders (petitioners herein) appealed to the Supreme Court of California which, on December 7, 1937, affirmed the order of the trial court of December 4, 1936, and held, among other things, that there was no violation of the California Constitution or laws and that the "due process," the "equal protection" and "contract" clauses of the federal Constitution had not been violated.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1938.
No. 21.

WILLIAM H. NEBLETT, *et al.*,

Petitioners,

vs.

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California, *et al.*,

Respondents.

Brief of Respondents, Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.

PREFATORY STATEMENT.

[Italics are ours.]

This cause is brought before the court on certiorari to the Supreme Court of California to review the judgment of that court [R. 1509-1544] affirming an order of the Superior Court of Los Angeles County made December 4, 1936 [R. 1378 *et seq.*]. The order approved a plan and agreement [R. 1396 *et seq.*] of Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, con-

servator of respondent, The Pacific Mutual Life Insurance Company of California, for the rehabilitation and reinsurance of the business of that company.

We are not satisfied with petitioners' statement of facts. It is colored by their legal theories and conclusions of law. We propose to give our own statement of facts as briefly as the complicated factual and procedural situation permits. Before giving this statement, we wish to direct the court's attention to certain rules of California law applicable to a consideration of the facts.

Petitioners appealed to the state Supreme Court on the judgment roll alone. None of the evidence was before the state Supreme Court and none is contained in the record before this court. The trial court made many recitals in the order appealed from but did not make formal findings of fact, none being required [R. 1531, 1532]. The order of December 4, 1936, made by the Superior Court, is tantamount to a general verdict in favor of the Commissioner. In such a situation all facts alleged by the Commissioner in his pleadings and in pleadings filed by other parties in support of the Commissioner's position, which tend to support the order appealed from, and are not negatived thereby must be presumed conclusively to have been proved by competent evidence and to be true. On the other hand any objections, statements of opinions, conclusions or allegations made by any of the parties herein, or other objectors, which if true or well founded would tend to militate against the correctness of the order appealed from, must be presumed conclusively not

to be sustained by the evidence—in fact it is conclusively presumed that they have been negated by competent evidence.

Gray v. Gray, 185 Cal. 598, 599;

Pavilion Ice Rink v. O'Brien, 60 Cal. App. 185, 186;

Pacific Investment Co. v. Ross, 131 Cal. 8, 10;

Antonelle v. City Hall Comm'rs, 92 Cal. 228, 229;

Shindelar v. Hadacheck, 88 Cal. App. 319, 320;

Cummings v. Howard, 63 Cal. 503, 504.

Moreover, where, as in this case, the appeal is taken on the judgment roll alone and no evidence is adduced, the findings or recitals of the trial court will be construed so as to support rather than overthrow the judgment or order, and it will be presumed that competent evidence was introduced in support of all such findings. Every presumption must be indulged in support of the order.

Keeling Collection Agency v. McKeever, 209 Cal. 625, 628;

Anglo California Trust Co. v. Oakland Railway, 193 Cal. 451, 461.

The state Supreme Court in its opinion adopted and followed the rules above announced [R. 1528, 1539].

Accordingly, in giving our statement of facts and the references to the record, we rely not only on the recitals of the various orders made by the Superior Court, but also on the allegations contained in the various pleadings filed by the Commissioner and by respondents in the Superior Court who aligned themselves with the Commissioner.

STATEMENT OF FACTS.

Prior to the time its business was taken over by the Insurance Commissioner, respondent, The Pacific Mutual Life Insurance Company of California (the Old Company), had been engaged for a period of sixty-eight years in the State of California, and elsewhere throughout the United States, in the business of issuing and selling life insurance [R. 820]. During the last fifty years it had also been engaged in the business of issuing and selling contracts and policies of health and accident insurance [R. 820]. In August, 1918, the Old Company began issuing and selling non-cancellable contracts and policies of health and accident insurance (in the record and herein called non-can policies) [R. 820].

Until recent years the business prospered, so that as of December 31, 1935, the Old Company was doing business in more than forty states [R. 847]; had assets in excess of $200,000,000 and life insurance in force in excess of $600,000,000 [R. 846], insuring the lives of approximately 200,000 persons [R. 6]. In addition it had outstanding about 75,000 policies of health and accident insurance [R. 6], of which approximately 49,000 (so stated by Mr. Neblett in his oral argument below (p. 8) and believed to be correct) were non-can policies. Approximately two-thirds of the life business was written on a participating basis, and the remainder on a non-participating basis [R. 846]. The life insurance business was very profitable and had built up adequate assets behind its reserves in a very substantial amount [R. 846]. Its *commercial* accident and health business had earned a net annual profit in recent years of several hundred thousand dollars [R. 847].

In the course of its operations the Old Company built up an extensive agency organization which operated throughout more than forty of the various states [R. 847]. This agency organization had been built up over the entire period of existence of the Old Company at an expense of several million dollars [R. 847]. By reason of the great volume of its business and the extent and nature of its operation, the Old Company had acquired a good will which was recognized throughout the entire United States [R. 847]. This good will, agency organization, and going concern values were and are of very great value, to-wit, several million dollars [R. 1386], and a group of objecting non-can policyholders alleged that $10,000,000 was a conservative figure to be placed upon said goodwill [R. 1148].

The non-cancellable health and accident policies, which as we have said, the Old Company commenced to issue in the year 1918, were based on an inadequate premium rate [R. 847], resulting from actuarial under-calculations [R. 847], and, as later experience developed, the premiums were found to be insufficient to pay the losses incurred thereon [R. 847-848]. In subsequent years the premium rates on the non-can policies were increased, but further experience disclosed that even at such increased rates the premiums were not sufficient to maintain the reserves necessary to mature the policy obligations [R. 848].

In 1936 the California Insurance Commissioner, in conjunction with the insurance commissioners of several other states, commenced a convention examination of the affairs of the Old Company as of December 31, 1935 [R. 3]. The report and examination was dated July 21, 1936 [R. 12], and was filed in the office of the Insurance Commissioner [R. 11]. It showed on its face that the

Old Company, as of December 31, 1935, had a surplus in the participating department of $4,792,118.97, and a deficit as of the same date in the non-participating department, including all accident and health business, of $22,356,493.67, so that the liabilities exceeded the assets for the combined departments by the sum of $17,564,374.70 [R. 30-31]. The deficit in the non-participating department was wholly caused by the condition of the accident department (which would include the non-can policies), in which the deficit was $23,025,470.70 [R. 30]. The report concluded with the following statement:

> "From a survey of the above figures, it is apparent that immediate action must be taken to protect policyholders." [R. 32.]

The condition was such that when said report of convention examination was filed with the Insurance Commissioners, or similar authorities of the various states within which the Old Company was authorized to transact business, its authority would be suspended or cancelled in most, if not all, of said states [R. 849]. This was particularly serious in that more than sixty per cent of the Old Company's business was conducted in states other than California [R. 848].

On July 22, 1936, the Commissioner filed an application in the Superior Court of Los Angeles County for an order appointing him conservator of the Old Company and vesting title to its assets in him [R. 1-32]. The application purported to be filed under Section 1011 of the Insurance Code [R. 10]. A certified copy of said report was annexed [R. 12-32] and incorporated by ref-

erence [R. 3]. The Commissioner alleged that said examination and report

> "Shows that respondent corporation is in such condition that its further transaction of business will be hazardous to its policyholders, its creditors and to the public; that said examination and report further shows that respondent corporation is insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1, of the Insurance Code of the state of California * * *." [R. 3.]

The Old Company appeared and consented to the relief prayed for by the Commissioner in his said application [R. 33].

Thereupon the Superior Court (Honorable Douglas L. Edmonds, presiding) made its order granting the relief prayed for [R. 34-38], and the Commissioner took possession of the business and assets of the Old Company [R. 39].

The Commissioner then filed his application for an order to liquidate the Old Company and for his appointment as liquidator [R. 39-47]. The Old Company consenting thereto [R. 48], the court (per Edmonds, J.) made an order of liquidation, appointing the Commissioner liquidator[1] [R. 49-52].

The Commissioner thereupon filed a petition for an order permitting, approving and authorizing the rehabili-

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[1]It must be presumed that this order appointing the Commissioner liquidator was vacated, for the order appealed from refers to the Commissioner as conservator "* * * or if he should hereafter be appointed liquidator" [R. 1389].

tation, sale and transfer of assets and reinsurance plan and agreement of the Old Company [R. 53-60]. Annexed to the petition as Exhibit "A" was the plan of rehabilitation [R. 63-102]. This application was purported to be filed under the provisions of Section 1043 of the Insurance Code [R. 62].

On the same day Judge Edmonds made his order approving the plan and authorizing the execution of the agreement and the transfer of the assets [R. 103-107]. The plan so approved[2] need not be noticed in detail as it was entirely superseded by a revised plan approved on December 4, 1936, and affirmed by the state Supreme Court, such judgment of affirmance being now presented to this court for review. Suffice it to say that the plan provided for the organization by the Commissioner of a new company to be known as "Pacific Mutual Life Insurance Company" (hereinafter and in the proceedings called the New Company); for the purchase of all its capital stock for $3,000,000 ($1,000,000 capital stock and $2,000,000 surplus), with funds of the Old Company, and for the transfer of substantially all of the assets of the Old Company to the New Company. The New Company was immediately organized, the capital stock purchased, and the Commissioner executed the agreement all on the same day that the foregoing orders were made, to wit, July 22, 1936 [R. 152 and 182]. On the same date the Commissioner executed a deed and

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[2]On the following day, July 23, 1936, upon the Commissioner's petition [R. 108-141], Judge Edmonds made an order approving an amendment to said agreement [R. 142, 143], and the amended agreement was thereupon executed [R. 146; R. 193-225].

bill of sale to the New Company [R. 183-190]. The Old Company joined in this deed and bill of sale [R. 190].

On July 23, 1936, the New Company filed a petition for intervention and for an order directed to all interested parties to show cause why the court should not make an order confirming, approving and ratifying the permission theretofore given with respect to said plan and agreement, and confirming and approving the execution of said amended plan and the transfer of the assets by deed and bill of sale [R. 144-151]. On the same date, July 23, 1936, Judge Edmonds made an order permitting intervention and directing interested parties to show cause on August 12, 1936, as prayed for in the petition of the New Company [R. 226-232].

It should here be noted that the foregoing orders—three made on July 22, 1936, and two made on July 23, 1936—are the only orders appearing in the record made by Judge Edmonds.

Beginning on August 6, 1936, interested parties, officers, stockholders and policyholders of the Old Company, filed various pleadings, variously denominated complaints in intervention or responses to said order to show cause [R. 233-321].

Petitioner Neblett, on August 10, 1936, filed a complaint in intervention [R. 245-251], in which he alleged he was the owner of a policy issued by the Old Company. He sought to set aside all of the orders theretofore made in this proceeding upon the ground *(inter alia)* that said orders were in conflict with Section 1 of the 14th amendment to the federal constitution. His complaint in intervention did not allege what kind of a policy he owned, but the order of December 4th referred to him

as the holder of a life policy [R. 1380], and in his notice of appeal he referred to himself as the holder of a life policy [R. 1459].

Shortly before August 11, 1936, it was learned that Judge Edmonds was the owner and holder of a life policy issued by the Old Company. Fearing that Judge Edmonds was thereby disqualified, and that some, if not all, of his orders might be called in question, the Commissioner, on August 11, 1936, again presented to the court his application for his appointment as conservator of the Old Company, and for the vesting of its assets in him as such conservator. The application was heard *de novo* by another judge of said Superior Court, the Honorable Henry M. Willis, who thereupon made an order [R. 322-328]: (1) ratifying, approving and confirming the order appointing conservator, made by Judge Edmonds, and adopting said order [R. 325]; (2) *appointing Insurance Commissioner, Samuel L. Carpenter, Jr., conservator of the Old Company* [R. 325]; (3) vesting title to the assets of the Old Company in the Commissioner [R. 326]; (4) enjoining the further transaction of business by the Old Company [R. 326]; (5) enjoining any interference with the management and transfer of the assets, and enjoining any attachment or levy without the consent of court [R. 327]; (6) requiring the officers, directors, agents, servants and employees of the Old Company to deliver to the Commissioner all books, records and other assets belonging to the Old Company [R. 327]; (7) directing the Commissioner to formulate, work out and prepare a plan of rehabilitation or reinsurance agreement, which should be subject to the approval of the court [R. 327-328]; and (8) decreeing that the order did not constitute any revocation or abrogation of any of the orders made by Judge Edmonds, or any

ruling or adjudication as to the effect of the ownership of the policy by Judge Edmonds on his right to sit in the proceedings [R. 328].

Beginning on August 12, 1936, numerous other policyholders filed complaints in intervention or answers to the order to show cause of July 23, 1936 [R. 329-464].

On August 13, 1936, the Commissioner filed an application before Judge Willis for an order to liquidate the Old Company [R. 465-474].[3] The next day he filed a petition[4] with respect to rehabilitation, sale and transfer of assets, and reinsurance plan and agreement [R. 484], resubmitting the plan of July 22, 1936 [R. 497-537].

Other policyholders filed complaints in intervention or answers to the order of July 23rd to show cause. On August 19, 1936, petitioner Alfred F. MacDonald filed such a return [R. 626-630], in which he alleged he was the owner of a non-can policy issued by the Old Company which was in full force and effect. He objected to the plan on the ground, among others, that it was in violation of his rights under certain sections of the state constitution and also Section 1 of the 14th amendment to the Constitution of the United States. He also objected to any plan or scheme which would impair the obligation of his policy. On the following day, August 20th, petitioners Bettin and Dickinson filed their return to said order to show cause [R. 681-687], in which they alleged they were each the owner of a non-can policy issued by the Old Company. They objected to the original plan on grounds identical with those urged by petitioner MacDonald.

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[3]It must be presumed that this application was never acted on [R. 1389].

[4]This petition was presumably abandoned [R. 1522].

The Commissioner and the New Company filed answers to certain complaints in intervention theretofore filed, among which was the answer to the complaint in intervention of petitioner Neblett [R. 548-550].

Policyholders and other persons interested continued to file complaints in intervention and responses to the orders to show cause of July 23rd and of August 13 and 14, 1936, made by Judge Willis, objecting to the Commissioner's plan.[5] The Pacific Mutual Agency Association filed a complaint in intervention [R. 819-827], supporting the Commissioner's plan except that it prayed for modification and amendment of paragraph 14 of the agreement between the Commissioner and the New Company [R. 826-827].

On August 17, 1936, Judge Willis on the application of the Commissioner made an order[5] authorizing and directing the Commissioner and the New Company to continue to perform acts required of or permitted to be performed by them under the original rehabilitation agreement [R. 851].

August 29, 1936, Judge Willis gave his order ratifying and confirming the intervention of the New Company and ratifying and confirming the order to show cause made July 23, 1936 [R. 829-830].

On September 25, 1936 [R. 904], the Commissioner filed his third petition for approval of a rehabilitation and

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[5]The orders to show cause of August 13th and 14th, and the order of August 17th are not contained in the transcript.

reinsurance agreement [R. 846-904]. The agreement itself was annexed to the petition as Exhibit A [R. 858-904]. This plan, which we will refer to as the approved or revised plan, differed in certain respects from the plan submitted with his petition of July 22nd and again with his petition of August 14th.

The petition alleged the corporate existence of the Old Company, its authority to do an insurance business prior to July 22, 1936, the amount, character and history of its business, and that the *life insurance* business was profitable [R. 846-847]. It was further alleged that the so-called "non-cancellable income disability policies" were issued at an entirely inadequate premium rate [R. 847-848], and that a formal examination had been made showing a deficiency in excess of $23,000,000.00 in the reserves necessary to mature the non-can policies. The Commissioner asserted that the filing of this report would result in a suspension or cancellation of the Old Company's right to do business in most, if not all, of the states [R. 848-849].

A recital was given of certain of the procedural steps theretofore taken and the measures the Commissioner had undertaken in organizing the New Company, "Pacific Mutual Life Insurance Company," and the transfer of certain assets of the Old Company to the New Company [R. 850]. The Commissioner alleged that he had given diligent study and attention to the problem of determining what steps would best serve the interests of all persons concerned, had made diligent inquiry among possible insurers, had invited the presentation of plans or offers, and had carefully examined and considered all plans suggested. He alleged that in his opinion no plan of rehabilitation or

offer of reinsurance had been presented which afforded to the policyholders of the Old Company the protection provided in the proposed rehabilitation and reinsurance agreement annexed to the petition as Exhibit A. He accordingly submitted the agreement and asked for the approval thereof [R. 851-852].

In his prayer he asked for an order fixing the time and manner of notice of hearing [R. 853], and directing all persons interested to show cause why an order should not be made [R. 853]; ratifying his various acts, including the conveyance theretofore made to the New Company [R. 853, 856, 856-857]; ratifying and approving the proposed agreement, Exhibit A, and directing him to execute such agreement [R. 853]; authorizing the performance of the terms of said agreement to be by him performed [R. 854]; directing the determination of federal taxes, giving them priority, and saving the rights of the United States [R. 854-856], and reserving jurisdiction in the court [R. 856].

Briefly, the revised plan (or agreement) provided for the sale of all the assets of the Old Company to the New Company excepting the stock of the New Company and the rights of action against the officers, directors and employees of the Old Company, including rights upon their fidelity bonds. The plan was optional as to all policyholders. Dissenters were given the right to file claims with the Commissioner thereafter to be appointed liquidator. The New Company reinsured and assumed all policies except policies held by active holders of non-can policies (*i. e.*, non-can policyholders who had not suffered disability on or before July 22, 1936). It also assumed one hundred per cent liabilities on matured policies, including obligations to disabled non-can policyholders (*i. e.*,

holders of non-can policies who on or before July 22, 1936, had become disabled). It assumed a fractional liability on the unmatured non-can policies of from 20% for those issued in 1918 to as high as 90% for those issued in 1935. Premiums were payable at the original rates fixed in the non-can policies. All the net profits of its business, except the participating department, and 10% of the net profits from assumed participating policies were to be paid ratably (a) to a special fund to be used for restoring to the future disabled holders of non-can policies who had consented to the plan full benefits retroactively according to the face of their policies, with interest at three and one-half per cent per annum, and (b) to the Commissioner as liquidator on account of claims filed by dissenters. The New Company agreed to pay to the Commissioner, as liquidator of the Old Company, the reserves behind each policy held by a dissenter and also a pro rata share of said net profits until the sums so paid to the liquidator were sufficient to pay all claims in full.

The revised plan of rehabilitation was dated as of July 22, 1936 [R. 1396], and the effective date was stated to be July 22, 1936, at the hour of 1:00 o'clock, P. M. [R. 1398.] The plan and agreement further provided that when approved by the court it should

> "constitute an independent agreement, superseding all prior agreements; and also an amendment of the agreement of July 22, 1936, relating to reinsurance by the New Company of the business of the Old Company, in such manner that such agreement, as amended, shall read in its entirety in the language of this agreement." [R. 1443.]

This plan was formulated following extended series of conferences conducted at the instance of the trial court, at which conferences representatives of holders of all forms of life and accident insurance policies issued by the old corporation, and representatives of its stockholders, general agents and creditors [R. 1272] took part. The Commissioner gave diligent study and attention to the problem of determining what steps would best serve the interests of all persons concerned [R. 851-852]. He made diligent inquiry among possible reinsurers or purchasers for the purpose of determining what avenues were open [R. 852]. He invited the presentation of plans or offers and carefully examined and considered all plans and suggestions submitted to him for the rehabilitation of the Old Company or for the reinsurance of its business in whole or in part [R. 852].

September 25, 1936, the court made its order to show cause in accordance with the prayer of the Commissioner's petition, fixed a time and place of hearing, and directed that notice of the hearing be given as follows: by posting; by publishing for ten consecutive days in five Los Angeles papers, two San Francisco papers and one Sacramento paper; by mailing a copy of the order and agreement to the Insurance Commissioner or equivalent official of each state in which the Old Company did business on July 22, 1936; by mailing to each policyholder and stockholder a notice of the time, place and purpose of the hearing, in a form specified in the order to show cause;

and by serving a copy of said order to show cause in the manner and in accordance with the provisions of Sections 1005 and 1010-1013a, both inclusive, of the Code of Civil Procedure, upon all persons who had personally made an appearance in the proceeding or upon their attorneys of record [R. 910-913].

On October 6, 1936, petitioners Bettin and Dickinson filed a return [R. 990-995] to the order to show cause dated September 25, 1936, in which they again alleged that each was the owner of a non-can policy issued by the Old Company, upon which all premiums had been paid and each of which policies was in full force and effect. They objected to the matters set forth in the order to show cause upon various grounds, among which were the following: that the proposed plan of rehabilitation was not the best possible plan; that the plan would render practically worthless policies owned by the objectors; that the plan undertook to substitute fractional liability by the New Company for the obligations of the Old Company to said objectors, and that the plan, if carried out, would constitute a violation of the objectors' rights under certain sections of the State Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States [R. 992-993]. They also objected to any plan which would impair their non-can policies in any manner of way [R. 993].

Petitioner Alfred F. MacDonald, on October 19, 1936, filed his return [R. 1233-1236] to the order to show cause of September 25, 1936. In this return he again alleged the ownership of a non-can policy in full force and effect, and he made substantially the same objections and upon substantially the same grounds as those made in the return of petitioners Bettin and Dickinson.

Respondents Day, Fabling, Gantz, Paschall and Wetzel, in whose behalf this brief is being filed, on October 19, 1936, filed a return [R. 1258, *et seq.*] to the order to show cause dated September 25, 1936, in support of the Commissioner's revised plan. From this return it appeared that all of said respondents were and had been for many years general agents of the Old Company [R. 1259-1265]; that four of them were holders of life policies as well as non-can policies issued by the Old Company [R. 1266-1269], and that they owned in the aggregate more than 6,000 shares of its capital stock. [R. 1270.] It was alleged that they intervened in the proceedings before the Superior Court on their own behalf and on behalf of all the general agents and managers of the Old Company [R. 1258], who with their sub-agents owned in excess of 22,000 shares of the stock of the Old Company, were the holders of 2,227 life policies in the total aggregate of $10,163,326.00, and were also holders of 430 non-cancellable income policies which provided for a total indemnity of $64,665.00 per month [R. 1270-1271].

Appellant Neblett, on October 19, 1936, filed his objections [R. 1274-1276] to the revised plan of rehabilitation, in which he objected to all of the matters set forth in the order to show cause, upon the ground, among others, that the orders prayed for by the Commissioner would be void for the reason that the same would be a denial of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Federal Constitution, and for the further reason[6] that the Insurance Code was repugnant both to the State Constitution, and to the Federal

[6]Mr. Neblett waived this reason on oral argument before the State Supreme Court [R. 1532].

Constitution, to-wit: the Fifth and Fourteenth Amendments thereof.

Many others filed returns to the order to show cause dated July 25, 1936, opposing said revised plan [R. 1075 *et seq.*]. E. A. Conway, Secretary of State and *ex officio* Insurance Commissioner of Louisiana, filed a return approving and supporting the plan [R. 1002 *et seq.*]. Certain interested parties, including petitioner Neblett, filed plans of their own [R. 1056 *et seq.* Hess; R. 1172 *et seq.*, 1319 *et seq.*, 1351 *et seq.*, the so-called Giannini plans and revision thereof; R. 1347 *et seq.* Neblett].

On October 8, 1936, the court (per Willis J.) made an order [R. 997-1001] *nunc pro tunc* amending certain recitals of the order appointing conservator made July 22nd by Judge Edmonds [R. 34 *et seq.*], and the order of similar effect made by Judge Willis on August 11, 1936 [R. 322 *et seq.*].

Beginning October 19, 1936, a hearing was had lasting approximately six weeks [R. 1378] during which evidence, both oral and documentary, was introduced and every opportunity afforded to all interested persons to be heard [R. 1383]. By the time the trial was commenced the pleadings were such that the stockholders, the general agents and every class of policyholder were before the court under the doctrine of class representation [R. 688, 1258, 766, 914 and 948. See, also R. 1379-1382]. It will be noted, however, that none of the petitioners filed any pleadings under the theory of class representation or for anyone other than himself [R. 245, 1274, 1347 (Neblett); 626 and 1233 (MacDonald); 681 and 990 (Bettin and Dickinson)].

On December 4, 1936 [R. 1395], the court (Judge Willis presiding) made the order appealed from [R. 1378-1444] approving the Commissioner's revised rehabilitation and reinsurance agreement [R. 858-904] which was annexed to said order as Exhibit "A" [R. 1396-1443].

The court, after reciting the appearances, the fact that evidence, oral and documentary, had been introduced, and full opportunity afforded to all persons to be heard, and that the court had read and considered its order of August 17, 1936, and the original agreement submitted by the Commissioner on July 23, 1936, ordered, adjudged and decreed that reasonable, just and sufficient notice had been given to all persons interested [R. 1384], and that an adequate opportunity to be heard had been given to policyholders, creditors, stockholders and other persons interested [R. 1384-1385]; that the Exhibit A annexed to the order was the plan proposed by the Commissioner, was recommended by him and was approved by the court [R. 1384]; that adequate provision was made by said agreement for each and every class of persons interested; that neither the plan nor the agreement discriminated unfairly or illegally in favor of any class; that the agreement and plan fairly and equitably protected and adjusted the rights, obligations and liabilities of all persons concerned, and provided for the removal of the causes which made the proceedings necessary [R. 1385].

The court then made an adjudication, the effect of which was to determine that the company was technically insolvent on December 31, 1935 and on July 23, 1936, within the meaning of the Insurance Code, and that on July 22, 1936, further transaction of its business would be hazardous to its policyholders and creditors and to

the public [R. 1385-1386]. The court adjudged that the assets of the Old Company would be of substantially less value if they were sold separately than if sold as a going concern, and that the Old Company had intangible assets, consisting of good will, agency organization and going concern value, of the value of several million dollars, which the plan would preserve and conserve [R. 1386]. The court further adjudged that the plan was feasible and operations thereunder were feasible [R. 1386]; that the plan and agreement were fair, just and equitable [R. 1387]; that the plan and agreement afforded a feasible method with in a reasonable time of fully restoring the benefits under the non-can policies partially assumed by the New Company [R. 1387], and that all the policyholders and creditors of the Old Company had been given and were afforded by said agreement a fair, just and timely opportunity to participate in the benefits thereof and in the plan therein embodied [R. 1387]. The various acts of the Commissioner, including the conveyance theretofore made to the New Company, were ratified and approved [R. 1387-1388]. In addition, the Commissioner was authorized to perform the terms of the agreement [R. 1388], and to transfer *de novo* to the New Company all of the assets of the Old Company, excepting the capital stock of the New Company and claims against the officers, etc., of the Old Company and upon their bonds [R. 1388-1390]. The Commissioner was authorized to perform future acts either as conservator or as liquidator, if he should thereafter be appointed liquidator, as contemplated by said agreement [R. 1389]. The court reserved jurisdiction [R. 1390], preserved the preferred rights of the United States [R. 1390-1391]; authorized the Commissioner and the New Company to

do all things necessary, desirable or proper to carry out the terms of the agreement [R. 1391-1392], and directed the officers of the Old Company to assist in the consummation and effectuation of said agreement [R. 1392-1393]. The court directed that the New Company be let into possession of the assets conveyed to it free and clear of any charge of the Old Company or any of its policyholders, creditors or stockholders, except such rights as were conferred under or grew out of the rehabilitation agreement [R. 1393-1394]. All persons were barred from making any complaint in respect to said agreement except as therein permitted or by an appeal, and all suits were barred [R. 1394-1395]. Finally, the acts of the Commissioner done pursuant to the orders of August 11, 1936, and August 17, 1936,[7] were ratified and approved [R. 1395].

Of the numerous policyholders, stockholders and other persons interested in the proceedings, the four petitioners alone appealed to the Supreme Court of California for themselves only and not in behalf of any other of the persons interested [R. 1451 (Neblett); R. 1462 (Bettin and Dickinson); R. 2 in L. A. No. 16222 (MacDonald)]. Petitioners took their appeal on the judgment roll alone, so that no evidence was before the state Supreme Court [R. 1526, 1529].

In support of an affirmance of the order from which the appeal was taken the attorneys for the Commissioner were joined by William M. Rains, Esq. (10 Cal. (2d) 313), attorney for the respondents Edwin Janss, *et al.*, a committee representing commercial policyholders, non-

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[7]This order does not appear in the record.

can policyholders and life policyholders [R. 1382]; by Henry S. Dottenheim, Esq. (10 Cal. (2d) 313), attorney for certain respondents, holders of non-can policies and for all non-can policyholders not otherwise represented [R. 948]; and by the authors of this brief (10 Cal. (2d) 313), in behalf of respondents Carroll C. Day, *et al.*, whose interests have already been specified:

Subsequent to the making of the order of December 4, 1936, and prior to January 7, 1937, the Commissioner as conservator of the Old Company, executed the rehabilitation and reinsurance agreement and executed a new deed and bill of sale in favor of the New Company [Supp. R. fol. 101].[8] On January 7, 1937, the Commissioner filed in the Superior Court of Los Angeles County his application for an order to liquidate and for his appointment as liquidator of the Old Company [Supp. R. fols. 1-10]. On February 2, 1937, the Superior Court of Los Angeles County made an order for liquidation of the Old Company and appointed Samuel L. Carpenter, Jr., liquidator

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[8]At the time this brief is being printed the suggestion of respondents Day *et al.* of a diminution of the record and their motion for certiorari submitted on October 3, 1938, is still pending and undetermined. Limited time has forced us to prepare this brief as if said motion had been granted and the Supplement to Transcript of Record mentioned therein were before the court. Except as otherwise stated, references to said "Supplement to Transcript of Record" are to the folios (*i. e.*, the pages as originally printed and filed in the Supreme Court of California) of Mr. Neblett's Transcript on Appeal in L. A. No. 16221.

thereof [Supp. R. fols. 99, *et seq.*]. Acting under the authority of Section 1019 of the Insurance Code, the court fixed the rights and liabilities of the Old Company, its creditors, policyholders, shareholders and all other interested persons as of July 22 1936 [Supp. R. fol. 103]. Petitioners herein took appeals to the Supreme Court of the State of California from the order of February 2, 1937 [Supp. R. fols. 107, 3 (of L. A. 16245) and 3 (of L. A. 16246)], which appeals are now pending and undetermined, submission having been vacated pending the decision of this court herein. (Minutes May 19, 1938, 92 Cal. Dec. page ii, following p. 462.)

December 7, 1937, the state Supreme Court affirmed the order approving the plan and agreement [R. 1509], holding in brief that Judge Edmonds was disqualified and that all his orders were void, but nevertheless, the Commissioner was authorized to, and did lawfully, enter into possession of the property on July 22, 1936, pursuant to the summary seizure provisions of Section 1013 of the Insurance Code; that the holding that Judge Edmonds' orders were void did not affect the validity of any of the subsequent proceedings, which stand by themselves independently of the prior orders [R. 1527]. The state Supreme Court held that the Commissioner's petition (or application) for his appointment as conservator contained proper allegations; that the transfer was not in fraud of creditors; and that the plan and the order appealed from did not violate any of the constitutional rights of the appellants, petitioners here. A rehearing was denied on January 6, 1938 [R. 1545].

Within due time (April 2, 1938) petitioners petitioned this court for writ of certiorari, which was granted May 16, 1938 (304 U. S. ....., 58 S. Ct. 1039).

THE ISSUES INVOLVED.

Upon the foregoing facts, petitioners urge seven grounds[9] why the judgment of the state Supreme Court should be reversed.

1. They contend that the Commissioner's application for his appointment as conservator of the Old Company was insufficient in substance; that the Superior Court never obtained jurisdiction over the subject matter of this special proceeding, and consequently the order of December 4, 1936, is void and for that reason they have been deprived of their property without due process of law.

2. They assert that Judge Willis confirmed Judge Edmonds' void orders, including those affecting title; that the state Supreme Court erroneously held that the void orders could be validated by subsequent approval, and that subsequent orders of a qualified judge confirming void orders of a disqualified judge deny them due process of law under the Federal Constitution.

3. They urge that the holding of the state Supreme Court, to the effect that the Commissioner could lawfully carry on the business of the Old Company while in conservatorship through the agency of a corporate instrumentality (the New Company), is void, because it is in direct violation of law and for that reason their property has been taken without due process of law.

The three points above stated are unique in this case and could not have been urged except for the fact that Judge Edmonds was disqualified and his orders void, and

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[9]We have in some instances grouped several of petitioners' related points as one ground.

except for the further fact that the Commissioner's application for appointment as conservator was in the particular form appearing in the record.

In addition to the foregoing points founded on procedural facts, petitioners urge four additional points, as follows:

4. They contend that the Old Company was in legal effect reorganized, and that this power to reorganize cannot be implied from the right of the Commissioner as conservator to enter into rehabilitation agreements (*i. e.*, the construction thus given to the Insurance Code was erroneous). They assert that the state Supreme Court, in holding to the contrary, erroneously relied on certain New York decisions.

5. Petitioners urge that the language of Section 1043 of the Insurance Code providing that the Commissioner, with the approval of court, "may enter into rehabilitation agreements," is so vague and indefinite as to be unconstitutional.

6. Petitioners argue that the order of December 4, 1936, is violative of their constitutional rights and that they were compelled to consent to the Commissioner's plan of rehabilitation or lose all their rights; that the only right given to nonconsenting policyholders is to file a claim with the liquidator, and that there never was any liquidator.

7. In their supplemental brief petitioners contend that Section 1011 of the Insurance Code is unconstitutional in

that (a) the Superior Court is required to vest title to the assets of an insurance company in the Commissioner upon his filing an application for appointment as conservator [Supp. Br., Point II, pp. 7-9], and (b) the Insurance Commissioner takes evidence and makes findings determining the forfeiture of title without notice and hearing [Supp. Br., Point III, pp. 10-16].

Of the seven contentions urged by petitioners we contend that the first four do not present federal questions.*

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*NOTE. In their supplemental brief [Point I, pp. 5-6] petitioners assert upon the authority of *Brinkerhoff-Faris Trust & Savings Bank v. Hill,* 281 U. S. 673, that all of their points raise federal questions. In the case cited the Supreme Court of Missouri denied petitioner any relief in equity, holding that it had an adequate remedy at law. However, by previous decisions the Missouri court had denied the existence of any such remedy and at the time of the decision there under review the time to exercise the remedy had lapsed. This court, while not denying to the state court the right to construe its own statutes, properly held that where such construction denied petitioner any hearing at all, there was a denial of due process. The case is not in point. The reasons why the contentions of petitioners, grouped above as points 1 to 4, inclusive, do not present federal questions will be given in our answer to these four propositions.

We also contend that the fifth point and the seventh point, while apparently raising federal questions, are not well taken in law and really present no questions of substantial merit. The sixth point, we concede, raises a federal constitutional question, but in this regard we contend that the state Supreme Court correctly decided that there was no impairment of the obligation of contract and no unlawful or unconstitutional discrimination.

We propose, nevertheless, to meet fully all seven contentions of the petitioners, without prejudice, however, in respect to the new points raised for the first time in the supplemental brief, to urge that these new points should not be considered by the court.

SUMMARY OF THE ARGUMENT.

1. The first point decided by any court, although it may not be in terms, is that the court has jurisdiction. The Superior Court decided that it had jurisdiction, and this question was therefore inherently involved in the appeal. The state Supreme Court by affirming the order decided that the Superior Court had jurisdiction. The state Supreme Court also expressly determined that the Commissioner's application for his appointment as conservator was sufficient under Section 1011 of the Insurance Code. This question is peculiarly a question of state law and cannot be converted into a federal question by the assertion that the Superior Court under California law did not have jurisdiction. The state Supreme Court, as a matter of state law, having decided that the Superior Court did have jurisdiction, and petitioners having appeared and having been heard, there is no ground for arguing that there has been any denial of due process of law because of lack of jurisdiction in the state courts. Moreover, on the merits, petitioners' contentions are not well taken. The said application was clearly sufficient. The Commissioner alleged two different statutory grounds for his appointment as conservator, each of which was properly set forth in the application.

2. The orders made by Judge Willis are valid and do not depend on void orders made by Judge Edmonds. Judge Willis could and did validly ratify the acts of the Commissioner, including his conveyance to the New Company on July 22, 1936. The Superior Court obtained jurisdiction upon the filing of the Commissioner's application for appointment as conservator and the appear-

ance of the Old Company. The fact that the application was called up before a judge disqualified to act thereon does not divest the court of jurisdiction, although the order of the judge is void because of his personal disqualification. Petitioners' contention that the state Supreme Court held that void orders of Judge Edmonds were validly ratified by Judge Willis is not supported by the record. The Supreme Court held that the order appealed from validated the acts of the Commissioner. This holding was on a matter of state law and does not raise a federal question. On the merits the opinion was correct. The order appealed from authorized the Commissioner to make a new conveyance to the New Company and such conveyance was actually made.

3. The asserted error of the state Supreme Court in holding that during the period of conservatorship the Commissioner could operate the business of the Old Company through his corporate instrumentality, the New Company, does not raise a federal question. Whether the Commissioner could so operate the business was peculiarly a question of state law and the decision of the state Supreme Court is conclusive here. Even if it be assumed that the Supreme Court of California in so holding was in error, that does not make its decision void or support a claim of lack of due process. Moreover, petitioners are not aggrieved thereby.

4. The asserted error of the state Supreme Court in *construing* the state Insurance Code so as to permit the rehabilitation of the business of an insolvent insurance company by means of a new company is peculiarly a question of state law and does not present a federal question. This court is bound by the decision of the state

Supreme Court in that regard. (Whether the plan of rehabilitation violates the constitutional rights of petitioners is an entirely different question which will be considered later.)

5. The language of Section 1043 of the Insurance Code of California, providing that the Commissioner as conservator or liquidator may subject to the approval of the court enter into rehabilitation agreements, is not vague or uncertain and the section is constitutional. Said section is a grant of power to be exercised by the Commissioner under the direction of the Superior Court subject to appeal to the state Supreme Court. The Commissioner is neither forbidden nor required to enter into such agreements. Neither he nor the other party to the agreement nor the persons interested in the insurance company being rehabilitated are required to act at their peril. The term "rehabilitation agreements" had been given a definite meaning before the Insurance Code was enacted in 1935 by the decisions of the New York state Courts made under a statute upon which the California Insurance Code is modeled.

6. The business of insurance is affected with a public interest. The business of insurance vitally affects the state and its citizens and the state may take reasonable methods to rehabilitate the business of an insolvent insurance company and avoid liquidation. It protects its own interest and the interest of the policyholders generally through the exercise of the police power.

7. The approved plan does not violate petitioners' rights under the Federal Constitution. Reinsurance with the New Company was optional with all policyholders. They were not compelled to take out reinsurance because of the fact that a liquidator had not been appointed by December 4, 1936. It will be presumed from the record, and the fact is that a liquidator was appointed shortly after December 4, 1936. Since the Old Company was insolvent the only right the policyholders had was to receive the equivalent of what they would have received upon complete liquidation. They had no vested right in any form of remedy, and could not insist on liquidation instead of rehabilitation. It is to be presumed from the record (which contains no evidence) that each dissenter from the plan will receive as much as or more than the amount he would receive on liquidation. If, however, it could be assumed that dissenters are placing some small portion of their share of the assets to the risk of the new business, no constitutional rights are impaired thereby. All this was done for the benefit of all the creditors. The Commissioner had the option to liquidate, but this would compel a forced sale of the assets and would destroy intangible assets of very great value to the detriment of all policyholders, consenters or dissenters. A ratable assumption of all policies would not only destroy the intangible assets but would inevitably lead to liquidation. The approved plan was not unjustly discriminatory to any class of creditors. The difference in treatment was necessary because it was the only

means of retaining the Old Company's business as a going business and of furnishing a fund from future profits, from which the holders of non-can policies who consent to the plan may eventually become fully restored and dissenters may receive not only the full amount of what they would have received on liquidation but even more, to wit, the full amount of their claims. The intangible assets consisting of goodwill, going concern value and agency organization were inherently a part of the profitable business, the obligations of which were completely assumed. A life insurance business differs from the ordinary business in that the customers are the creditors. Any plan which would not provide for the complete assumption of the obligations of the profitable business would destroy the going concern values and goodwill. Under the approved plan these intangible assets are conserved and inure to the benefit of holders of non-can policies who assent to the plan and to the dissenters. The principle of the approved plan was the only feasible method of avoiding liquidation, immediate or deferred, and of conserving the full amount of the intangible assets and the probability of the receipt of continued profits.

8. Apart from the benefits secured to the non-can policyholders and dissenters of all classes, the plan was entirely equitable. The decided cases show a pronounced trend toward the broad equitable principle that policyholders in each class have a preferred claim to the reserves behind their policies over the rights of the policy-

holders of any other class. The court should not hesitate to apply this principle to the situation in the case at bar.

9. Similar proceedings have been upheld in other jurisdictions and the application of the principles in the decided cases to the case at bar warrants an affirmance of the judgment of the state Supreme Court.

10. Petitioners' contentions, made for the first time in their supplemental brief, that Section 1011 of the Insurance Code is unconstitutional because (a) the Superior Court is required to vest title to the assets of an insurance company in the Commissioner upon his filing an application for appointment as conservator, and (b) because the Commissioner takes evidence and makes findings determining the forfeiture of title without notice and hearing, were not raised in the state proceedings nor in the petition for *certiorari*, neither were they assigned as error, nor mentioned in the brief in support of said petition. Under such circumstances the point should not be considered by this court. However, there is no merit to petitioners' contentions in that regard. The Commissioner acts purely in an administrative capacity, much as a bank examiner and the Comptroller of the Currency act under the national banking law. The appointment of a conservator under Section 1011 of the Insurance Code is subject to immediate revision and full hearing under Section 1012 of the Insurance Code. In any event, no one could raise this point except the Old Company, and it appeared and consented to the appointment of the Commissioner as conservator.

ARGUMENT.

I.

The State Supreme Court Decided That the Superior Court Had Jurisdiction and Expressly Determined That the Commissioner's Application for His Appointment as Conservator Was Sufficient in Substance to Vest the Trial Court With Jurisdiction. This Holding Is Binding on This Court for It Is Purely a Matter of State Law. In Any Event, the Petitioners' Contention Is Without Merit.

Petitioners assert that the Commissioner's application for his appointment as conservator of the Old Company is insufficient in substance; that therefore the Superior Court never obtained jurisdiction over the subject matter of this special proceeding; and that consequently the order of December 4, 1936, is void and for that reason they have been deprived of their property without due process of law. [Pet. pp. 33-38; reasserted without argument, Supp. Br. pp. 19 and 22.]

Petitioners are not asserting under this point any lack of due process in the usual sense of that term, and, indeed, they could not. They were given ample notice and opportunity to appear and be heard. The requirements of due process were thus satisfied.

Dohany v. Rogers, 281 U. S. 362, 369.

Petitioners appeared and were heard both by the Superior Court and by the state Supreme Court; accordingly they are in no position to complain of lack of due process.

Doty v. Love, 295 U. S. 64, 74.

Whether the Superior Court had jurisdiction was a matter necessarily presented to it for determination at the very threshhold of the proceedings.

> "* * * The first point decided by any Court although it may not be in terms, is, that the court has jurisdiction, otherwise it would not proceed to determine the rights of the parties."
>
> *Clary v. Hoagland*, 6 Cal. 685, 688.

The Superior Court having decided that it did have jurisdiction, this question was inherently involved in the appeal taken by the petitioners to the state Supreme Court. Manifestly that court had jurisdiction to determine the jurisdiction of the Superior Court.

Smith v. Westerfield, 88 Cal. 374, 380-381;

Hochheimer v. Superior Court, 65 Cal. App. 206, 210;

Pacific Dry Goods Co. v. Superior Court, 9 Cal. App. (2d) 707, 711.

The Supreme Court of California by affirming the order decided that the Superior Court had jurisdiction.

Clary v. Hoagland, 6 Cal. 680, 687-688;

Scrimsher v. Reliance Rock Co., 1 Cal. App. (2d) 382, 393;

See, also:

Standard Oil Co. v. Missouri, 224 U. S. 270, 280-281.

Although the argument now advanced by petitioners was not urged in the state Supreme Court, a reference to the opinion shows that that court nevertheless express-

ly decided that the Commissioner's application (or petition) for his appointment as conservator was sufficient in substance.

The state Supreme Court reached the conclusion, and declared that all of Judge Edmonds' orders were void. [R. 1527]. It followed that (until August 11, 1936) the Commissioner was in possession of the assets of the Old Company without any valid order appointing him either conservator or liquidator. However, the state Supreme Court said:

> "In fact, the holding that all of the orders made by Judge Edmonds were void, does not even constitute a holding that the taking possession of the assets of the Old Company by Carpenter on July 22nd without a prior valid court order, was unlawful." [R. 1527.]

The state Supreme Court proceeded to hold that the taking possession was valid and lawful under Section 1013 of the Insurance Code which provides for a summary seizure [R. 1528]. The court then declared:

> "The petition for appointment as conservator *containing proper allegations,* was filed July 22nd." [R. 1528.]

Now, Section 1015 of the Insurance Code provides:

> "Immediately after such seizure, the Commissioner shall institute a proceeding as provided for in Section 1011 and thereafter shall proceed in accordance with the provisions of this article."

Later on in its opinion the state Supreme Court again referred to Section 1013 and epitomized the provisions of Section 1015 [R. 1533].

It is plain, we believe, that the state Supreme Court had in mind that a summary seizure under Section 1013 of the Insurance Code is valid and lawful only when proceedings are immediately taken under Section 1011 of that code, and that the state Supreme Court was deciding that an application proper under Section 1011 had been filed and that therefore the summary seizure was lawful.

This construction is borne out by other language in the opinion. The contents of the Commissioner's application for an order appointing him conservator are carefully and meticulously digested by the court [R. 1518]. Later in the opinion the court analyzed and examined Section 1011, pointing out the necessity for a verified petition "as was done here" [R. 1533].

We are not alone in our view that the state Supreme Court held in its opinion that the Commissioner's application for appointment as conservator was sufficient to vest the Superior Court with jurisdiction. This very point was urged in the Circuit Court of Appeals for the Ninth Circuit in the case of *Hutchins v. The Pacific Mutual Life Insurance Company of California*, 97 Fed. (2d) 58. In that case the appellant was a stockholder of the Old Company and appearing through her counsel, Messrs. Neblett, Warner & MacDonald (two of whom are petitioners herein), sought to set aside the state proceedings. Her contentions on the jurisdictional point and the answer of the Circuit Court of Appeals appear in the opinion of that court as follows:

> "In resisting the motion for leave to amend the appellees presented a number of affidavits. One of these contained excerpts from the petition of the commissioner filed in the state court. It was con-

tended on the argument that these excerpts disclose lack of jurisdiction in the state court to proceed. Without discussion of the point, it is enough to say that neither in the original nor in the proposed amended bill were any facts alleged disclosing lack of jurisdiction in the state tribunal, and the sufficiency of appellant's pleading was to be determined without reference to the contents of affidavits presented for another purpose. *It should be pointed out, however, that the Supreme Court of the state has determined that the proceedings were in conformity with the statute.*"

97 Fed. (2d) 60-61.

The determination that the Commissioner's application was sufficient in substance to satisfy the requirements of Section 1011 of the Insurance Code was peculiarly a matter of state law which it was the exclusive province of the state Supreme Court to determine, and that holding is conclusive here.

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860;

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817;

North Laramie Land Co. v. Hoffman, 268 U. S. 276, 282.

The petitioners cannot convert this question of state law (jurisdiction of the state court) into a federal question. The federal question is necessarily grounded on the premise that under the state law the Superior Court never acquired jurisdiction. The Supreme Court of California having determined petitioners' premise against them, there is no ground for arguing the conclusion that they have

been deprived thereby of their property by an order made without jurisdiction—*i. e.*, as they say, without due process of law.

But in any event petitioners' contention is without merit. Section 1011 of the Insurance Code authorizes the Superior Court to appoint a conservator

> "Upon the filing, by the Commissioner, with the Superior Court in the county in which is located the principal office of such person in this state, of a verified application showing any of the following conditions to exist: * * *
>
> (d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or creditors, or to the public."
>
> *Insurance Code*, Sec. 1011.

The Old Company was a California corporation with its principal place of business in Los Angeles County [R. 2]. The Superior Court of that county was the proper court in which to commence these proceedings. In his said application the Commissioner alleged that he had made an examination of the business and affairs of the Old Company as of December 31, 1935, and had joined in a report of such examination, a certified copy of which was annexed to the application as Exhibit A [R. 3]. He alleged in the present tense "that said examination and report shows that respondent corporation *is* in such condition that its further transaction of business will be hazardous to its policyholders, its creditors, and to the public; * * *" [R. 3]. This application spoke as of the date of its filing, to wit: July 22, 1936 (21 Cal. Jur. 15). Subdivision (d)

of Section 1011 contemplates three steps in chronological order: (1) an examination and report; (2) a finding by the Commissioner (if warranted) that the company is in a hazardous condition, and (3) an application for appointment as conservator. Obviously an examination of a company of this size takes considerable time and, as is usual, the report is made as of a date previous to the completion of examination. These circumstances must be deemed to have been in the mind of the California Legislature when it enacted Section 1011. The mere fact that the report of examination was made as of December 31, 1935, is of no materiality. The report itself was completed on and is dated July 21, 1936, [R. 12] the day before the application was filed. The allegations of the application referred to, show that the Commissioner made an examination and that he found the company's business in a hazardous condition. This is sufficient under Section 1011.

Section 1011 of the Insurance Code further authorizes the appointment of a conservator

> "* * * upon the filing, by the commissioner, of a verified application accompanied by a certified copy of the commissioner's last report of examination of any person to whom the provisions of this article apply showing such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this code * * *."

The Commissioner's application was verified [R. 9], the report annexed was a certified copy [R. 11], and the allegations in this regard were in the present tense [R. 3.] Section 1011 does not require that the Commissioner allege in his application that the annexed report is the last report. The application is sufficient if in fact the ac-

companying report is the last report of examination. The Superior Court found, presumably upon competent evidence, that the application was accompanied by a certified copy of the Commissioner's last report [R. 1001].

While we believe that the application complied literally with the provisions of Section 1011 of the Insurance Code, such literal compliance is not required. Proceedings of this nature are not a "verbal puzzle," a substantial compliance is enough.

Richardson v. Butler, 82 Cal. 174, 176.

Accord:

In re Arguello, 85 Cal. 151, 152;

Estate of Heydenfeldt, 127 Cal. 456, 458;

People v. Bank of San Luis Obispo, 154 Cal. 194, 201.

The cases cited by petitioners do not lead to a contrary conclusion.

In *Murray v. American Surety Co.,* 70 Fed. 341, the question was whether the plaintiff, purportedly acting as receiver of a state bank by appointment of a California state court, had capacity to sue. The Circuit Court of Appeals for the Ninth Circuit, *in the light of the decisions of the California courts,* held that under the particular statute involved there was no authority in the Superior Court to appoint a receiver.

Smith v. Westerfield, 88 Cal. 374, was an appeal from an order of the Superior Court sitting in probate and it was held that the court had acted in excess of its jurisdiction. However, the Supreme Court of California said:

> "Our appellate jurisdiction over the judgments of the Superior Court includes those in which that court improperly assumed jurisdiction, as well as those in which it was properly entertained."
>
> 88 Cal. 380, 381.

The case of *East Tennessee V. & G. R. Co. v. So. Tel. Co.,* 112 U. S. 306 (Pet. p. 34) has no bearing on the case at bar. There on appeal from a decision of the Circuit Court, this court held that the trial court, upon removal of a special proceeding from the state court, was limited by the applicable provisions of the state law.

Petitioners' quotation of the statement (Pet. pp. 34-35) that insolvency "proceedings are special, and no intendments can be made in favor of the jurisdiction," appears in *Daman v. Hunt,* 47 Cal. App. 274, 281, which relied on decisions of the Supreme Court under the California Constitution of 1849. It is to be noted that the Supreme Court of California, in denying a hearing in the *Daman* case, expressly withheld its approval of the very language quoted and relied upon by petitioners (47 Cal. App. 289, 290).

II.

The Orders Made by Judge Willis Are Valid and Do Not Depend Upon Void Orders Made by Judge Edmonds. Judge Willis Could and Did Validly Ratify the Acts of the Commissioner Including His Conveyance to the New Company on July 22, 1936. The Superior Court Obtained Jurisdiction Upon the Filing of the Commissioner's Application for Appointment as Conservator and the Appearance of the Old Company. The Fact That a Disqualified Judge Purported to Act on Said Application Did Not Divest the Superior Court of Jurisdiction.

Petitioners contend that Judge Willis subsequently approved Judge Edmonds' void orders, that the state Supreme Court erroneously held that such subsequent approval made the void orders valid (Pet. p. 39), and that it was a denial of due process to affect the rights of policyholders by void orders. They insist that *all the orders* affecting title to the assets and approving their transfer to the New Company were void because of the disqualification of the judge who made the orders (Pet. p. 36). In their supplemental brief petitioners amplify their contentons and now make the assertion that the *Superior Court of Los Angeles County* was without jurisdiction because of the disqualification of Judge Edmonds (Supp. Br. p. 18).

It will be recalled that Judge Edmonds on July 22, 1936, made an order purporting to appoint the Commissioner conservator and vesting title to all of the assets in him [R. 34, 36], and that thereafter Judge Willis approved the Commissioner's original plan and authorized the trans-

fer of most of such assets to the New Company [R. 103, *et seq.*]. Such transfer was then made by the Commissioner on July 22, 1936, by deed and bill of sale.[10] [R. 183-192]

The disqualification of Judge Edmonds having been discovered, Judge Willis on August 11, 1936, made his own order in which in the first paragraph thereof he purported to adopt, ratify and confirm Judge Edmonds' order appointing conservator, but in the second and subsequent paragraphs, he made the appointment *de novo* and vested the assets of the Old Company in the Commissioner as conservator [R. 325-326]. Except for two orders mentioned in the footnote,[11] the order of August 11th was the only order made by Judge Willis which purported by its terms to adopt, ratify or confirm any order made by Judge Edmonds.

Upon the Commissioner's petition therefor, submitting a revised plan of rehabilitation [R. 846, *et seq.*] which by

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[10]The Old Company joined in this conveyance [R. 190] but this is considered an immaterial circumstance.

[11]On August 29, 1936, Judge Willis made an order ratifying the intervention of the New Company and Judge Edmonds' order to show cause of July 23, 1936 [R. 828, *et seq.*]. This is of no importance. It merely gave standing to the various responses theretofore made to the order to show cause of July 23rd (including those of petitioners) and in fact was entirely superseded by Judge Willis' order to show cause dated September 25, 1936 [R. 905, *et seq.*]. On October 8, 1936, Judge Willis made an order amending *nunc pro tunc* Judge Edmonds' order appointing conservator dated July 22, 1936, and also his own order of August 11th [R. 997].

its terms was to become effective as of July 22, 1936, Judge Willis made an order directing that all persons interested should show cause why an order should not be made among other things ratifying the Commissioner's act in forming the New Company; ratifying, confirming and approving the transfer and conveyance heretofore made to the New Company (*i. e.*, the Commissioner's conveyance of July 22, 1936), and ratifying and approving the revised plan which by its terms was to become effective as of July 22, 1936.

The order of December 4, 1936, here under review, approved the acts of the Commissioner in forming the New Company [R. 1387] and in making the transfer of July 22nd [R. 1387-1388], and approved the revised plan [R. 1388].

It is upon the foregoing facts that petitioners base their contention that Judge Willis confirmed and ratified Judge Edmonds' void orders and that the Supreme Court held that he validly did so. They say, for instance, that the order to show cause of September 25th directed the parties interested to show cause why the void orders of Judge Edmonds should not be approved (Pet. p. 44), whereas the record clearly indicates that said order was to show cause why the acts of the Commissioner should not be ratified and confirmed [R. 906].

In respect to Judge Willis' order of August 11, 1936, [R. 322] appointing the Commissioner conservator, the state Supreme Court first pointed out that Judge Willis ratified Judge Edmonds' order appointing the Commissioner conservator and then called attention to the fact that Judge Willis made the order *de novo* [R. 1521-1522].

To emphasize the point the state Supreme Court further in the same paragraph of its opinion said:

> "It is to be noted that by this order of August 11th Judge Willis not only purported to confirm and ratify the prior order of Judge Edmonds, but also made his own order appointing Carpenter conservator of the Old Company." [R. 1522]

The fact that one severable paragraph of the order of Judge Willis purported to ratify the void order of Judge Edmonds obviously fails to affect the other severable paragraphs of the order of Judge Willis' proceeding *de novo* to appoint a conservator. *(California Civil Code,* Sec. 3537.) The pointed remark of the Supreme Court of California above quoted was consistent with its holding that

> "The validity of the subsequent proceedings is not dependent on the validity of any order made by Judge Edmonds. The subsequent proceedings before Judge Willis stand by themselves independently of the prior orders." [R. 1527.]

In respect to the proceedings of September 25, 1936, the state Supreme Court noted that the Commissioner had asked for an order to show cause "why all the prior acts of the Commissioner should not be ratified, confirmed and approved" [R. 1524], and on the same day the order to show cause was issued. In analyzing the order of December 4, 1936, here under review the state Supreme Court said that the trial court not only approved the Commissioner's plan

> "but also ratified, confirmed and approved all prior steps taken by him." [R. 1525]

There is no escape from the fact that the state Supreme Court (a) noted that Judge Edmonds made an order authorizing the transfer of the assets as provided in the original rehabilitation agreement [R. 1520] and that the New Company asserted title to such assets [R. 1521] (*i. e.*, that the transfer had been made); (b) expressly held that all of Judge Edmonds' orders were void [R. 1526-1527]; (c) adverted to the fact that the order appealed from ratified, confirmed and approved all of the prior steps taken by the Commissioner [R. 1525], and (d) affirmed said order [R. 1544]. There is nothing in the record to sustain petitioners' contention that Judge Willis in his order of December 4, 1936, confirmed or ratified or attempted to confirm or ratify any void orders of Judge Edmonds. Judge Willis in the order of December 4. 1936, ratified, confirmed and approved the acts of the Commissioner done under the apparent authority of said orders of Judge Edmonds, including the conveyance dated July 22, 1936. There is nothing in the record which sustains petitioners' contention that the state Supreme Court held that Judge Willis could or did validly ratify any of the void orders of Judge Edmonds. Indeed, it would seem that the state Supreme Court decided exactly to the contrary.

Petitioners assert (Pet. p. 44) that it was vital to the Insurance Commissioner that the void orders of Judge Edmonds be confirmed. Their argument seems to be that there was no possible theory by which the acts of the Commissioner could be ratified or confirmed unless the orders of Judge Edmonds were likewise approved and confirmed. This contention is untenable.

As we have seen, the state Supreme Court (without discussion of the doctrine of ratification) affirmed the order of December 4, 1936, here sought to be reversed on *certiorari*, which order expressly ratified the prior acts of the Commissioner including the conveyance of July 22, 1936. This is tantamount to a decision that the acts of the Commissioner could be ratified. Whether, under the circumstances in this case, the Commissioner's conveyance to the New Company dated July 22, 1936, as well as his other acts could be ratified was peculiarly a question of state law which, under the authorities we have cited under point I *supra* is conclusive on this court, and petitioners' contention does not present a federal question.

On the merits, said holding of the state Supreme Court was correct.

It should first be observed that the Commissioner's conveyance of July 22, 1936, in favor of the New Company and the execution of the original agreement for rehabilitation were both done *after* the Commissioner had filed his application for appointment as conservator and *after* the Old Company had appeared and consented to the granting of the prayer of said application [R. 34]. The filing of this application and the appearance of the Old Company gave to the Superior Court of Los Angeles County (as distinguished from any judge thereof) exclusive jurisdiction of the subject matter and the parties. *(Lion Bonding Company v. Karatz,* 262 U. S. 77; *Penn General Casualty Co. v. Pennsylvania,* 294 U. S. 189; *California Code of Civil Procedure,* Sec. 416.)

Petitioners assert that the Superior Court of Los Angeles County had no jurisdiction because of the dis-

qualification of Judge Edmonds, citing *Lindsay-Strathmore Irrigation District v. Superior Court,* 182 Cal. 315 (Supp. Br. p. 18). The case is squarely against them. In that case, after trial in the Superior Court of Tulare County, a peremptory writ of prohibition issued to the court and to the judge to refrain from further proceeding in said cause

> "except that if a qualified judge is called to act as judge thereof the court may proceed with a new trial of said action before such judge."
>
> 182 Cal. 337.

Thereafter a new trial was had in the *Superior Court of Tulare County,* Honorable Albert Lee Stephens, then a judge of the Superior Court of Los Angeles County sitting by assignment. An appeal was taken and the judgment was affirmed in part, modified and affirmed in part, and reversed in part, with directions to the trial court, *i. e.,* the Superior Court of Tulare County *(Tulare Irrigation District v. Lindsay-Strathmore Irrigation District,* 3 Cal. (2d) 489, at 502-503 and 582-583).

Petitioners say in their supplemental brief:

> "The jurisdiction which the Superior Court did not have is said to have been picked up and reclaimed by the order of Judge Willis on August 11th." (Supp. Br. p. 18.)

As we have pointed out, the jurisdiction of the Superior Court attached and became exclusive the moment the

Commissioner filed his application for an order appointing him conservator [R. 1, *et seq.*] and the Old Company appeared [R. 33]. Necessarily both of these acts took place, and the Superior Court of Los Angeles County as a court had jurisdiction before the disqualified judge attempted to act [R. 34].

The jurisdiction of said Superior Court was not exhausted by orders made by Judge Edmonds *(Tulare Irrigation District v. Lindsay-Strathmore Irrigation District,* 3 Cal. (2d) 489, at 502-503).

While the Commissioner's application for his appointment as conservator was thus awaiting action by the Superior Court of Los Angeles County he took certain steps under the apparent authority of the void orders of Judge Edmonds. The act of the Commissioner in making the conveyance of July 22, 1936, in favor of the New Company was not void, it was merely unauthorized because the Commissioner had not *then* been validly appointed conservator or vested with title or authorized to make the conveyance by a valid order of the Superior Court. A distinction must be made between the orders of the court, void because made by a disqualified judge, and the acts of the Commissioner, done pursuant to the apparent authority of those orders. It would, indeed, be an unusual doctrine which made the Superior Court, acting through a qualified judge, powerless to ratify, approve and confirm the acts of the Commissioner under those circumstances.

We can assume for the purposes of the argument that the Commissioner on July 22, 1936, until August 11, 1936, was an interloper in the affairs and business of the Old Company, that he was, in short, a trespasser without any right of possession or custody.[12] On August 11, 1936, the Commissioner became vested with title to all of the assets of the Old Company by virtue of paragraph 3 of Judge Willis' order of that date [R. 326]. (See Insurance Code Section 1011). The state Supreme Court so held [R. 1541]. Assuming that the Old Company up until August 11th could have successfully rescinded and annulled the Commissioner's said conveyance, this right of rescission necessarily passed to the Commissioner as conservator along with all the other assets of the Old Company *(Id)*.

In making the conveyance of July 22, 1936, the Commissioner acted on behalf of the Old Company, after first having filed his application for appointment as conservator, thus giving the Superior Court jurisdiction. His said conveyance was capable of being ratified and adopted by him, subject to approval of the court. The Commissioner, in his petition for approval of the revised plan of rehabilitation filed September 25, 1936, [R. 846, *et seq.*], informed the court of the transfer of assets he had made on July 22, 1936 [R. 850-851], and prayed for an order to show cause why the court should not make an order ratifying, confirming and approving said transfer [R. 853.]

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[12]It should be noted, however, that the state Supreme Court held as a matter of state law that the Commissioner was lawfully in possession during this period under the summary seizure provisions of the Insurance Code [R. 1528].

Thus the Commissioner for himself ratified and adopted his prior acts. Pursuant to said petition and said order to show cause, the trial court in the order here under review ratified and approved the said conveyance of July 22nd [R. 1387-1388], thus making the said conveyance valid as of July 22, 1936, under the doctrine of ratification. (*Compare Koontz v. Northern Bank*, 16 Wall. 196, 201.)

In addition to the doctrine of ratification (followed by the state Supreme Court without discussion) there is an additional doctrine not discussed in the opinion—that of relation back of title—which supports the judgment of affirmance and does not require a holding that void orders may be ratified.

In our brief in opposition to the petition for certiorari herein, we suggested that, by analogy to the Bankruptcy Act, it was possible that the title which vested in the Commissioner on August 11, 1936, related back to the moment when he filed his petition for appointment as conservator on July 22, 1936, prior to the execution of the conveyance of the same date (Said Br. p. 6). We cited in support of this suggestion:

Hiscock v. Varick Bank of New York, 206 U. S. 28, 40;

Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 307;

Fairbanks Shovel Co. v. Wills, 240 U. S. 642, 649.

On further reflection, we are more firmly of the opinion that the Insurance Code can be construed to permit the application of the doctrine of relation back of title (compare Section 1019 of the Insurance Code), especially

where as here the interests of justice required the application of such doctrine.[18] (Compare *U. S. v. Anderson,* 194 U. S. 394, 399.)

In concluding the argument on this point we will notice briefly petitioners' contention that the only transfer of assets made by the Commissioner as conservator and/or liquidator to the New Company was by deed and bill of sale dated July 22, 1936, (Pet. for Cert. 8, 9, 13 and 37). The transcript of record naturally does not show what steps the Commissioner took after the order of December 4th was made, but it must be presumed in support of that order that the Commissioner, pursuant to express authority granted to him therein [R. 1388], executed such a new conveyance. In fact, the Commissioner subsequent to the order of December 4, 1936, and prior to January 7, 1937, did execute a new conveyance to the New Company [Supp. R. fol. 101]. But even if it be assumed that the Commissioner did not execute a new conveyance, this would furnish no ground for reversing the judgment of the state Supreme Court or the order of the Superior Court here under review. Surely a judgment is not to be reversed simply because the record may not show that it has been fully executed.

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[18]Necessarily in fairness to all persons interested their rights had to be fixed and the plan had to be made effective as of the day the Commissioner filed his application for appointment as conservator and the knowledge of the condition of the Old Company became public property. It would have been unjust and inequitable for the plan and agreement to fix the rights as of either August 11th or December 4, 1936, or any later date. Far from showing that the order of December 4th was void for this reason, it evidences the careful consideration of the equities given both by the Commissioner and the Superior Court, as well as by numerous attorneys who participated in the discussions at which this plan was formulated. See opinion of the trial court [R. 1470].

III.

The Commissioner Was Authorized During Conservation Proceedings to Operate the Business of the Old Company Through a Corporate Instrumentality, the New Company. The State Court's Decision to This Effect Does Not Violate the Due Process Clause of the Federal Constitution. Petitioners' Contention That Error Was Committed in This Regard Fails to Present a Federal Question; Neither Are Petitioners Aggrieved Thereby.

The state Supreme Court held that during the conservation period the Commissioner could and did lawfully conduct the business of the Old Company through his corporate agency, the New Company, and that the Superior Court validly approved such action [R. 1528-1529].

Relying on Section 1035 of the Insurance Code and two other California statutes petitioners contend that the decision of the state Supreme Court in this regard "is void because it is a direct violation of law" (Pet. p. 47) and that the state Supreme Court thereby failed to apply the due process guaranteed by the Federal Constitution.

It seems too obvious to require argument that the question whether the Commissioner could lawfully conduct the business of the Old Company through the instrumentality of the New Company was peculiarly a question of state law and required the interpretation of state statutes. Even if the interpretation were thought to be erroneous, that would not make the decision void. So far as this court is concerned, the state courts' interpretation of the state law

is conclusive. *(Ruhlin v. New York Life Insurance Co.,* 304 U. S. 202, 58 S. Ct. 860; *Erie Railroad v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817; *North Laramie Land Co. v. Hoffman,* 268 U. S. 276, 282.) Petitioners do not contend nor could they logically contend, that if the California law is correctly determined by the state Supreme Court such law is unconstitutional. As in their first point they are attempting to endow a question of state law with qualities of a constitutional question.

The cases cited by petitioners (Pet. p. 47) are not in point. *Schecter v. United States,* 295 U. S. 445, (also cited in petitioners' supplemental brief, page 9, along with *Panama Pacific Refining Company v. Ryan,* 293 U. S. 388) involved distribution of power between President and Congress or between Congress and the administrative officers or commissions, and are "quite beside the point" when applied to a state statute *(Highland Farms Dairy v. Agnew,* 300 U. S. 608, 612). In *Hentschel v. Fidelity & Deposit Company of Maryland,* 87 F. (2d) 833, the Circuit Court of Appeals of the Eighth Circuit made some observations as to the power of the Missouri Superintendent of Insurance under Missouri statutes *Levezey v. Gorgas,* (Pennsylvania) 4 Dall. 71, was a decision by the High Court of Errors and Appeal of Pennsylvania passing on a matter of state law. In none of these cases did this court deny to a state court the power to interpret its own statutes or hold that a construction such as was here given to the Insurance Code was violative of constitutional rights.

The United States Government and its officers are more and more frequently using corporations as the instrumentality to carry out their duties. We have yet to learn that any of these laws are for that reason violative of the Federal Constitution. Surely if the California law permits it, as the state Supreme Court has held, that state and its Insurance Commissioner are not to be denied the use of this effective and efficient instrument.

Moreover, it does not appear that petitioners have been aggrieved by that portion of the decision which holds that the New Company was lawfully in possession during the preliminary period. Petitioners, as simple contract creditors, were not entitled to the possession of the assets during any of these times and the record is barren of any suggestion that their rights were impaired or prejudiced by reason of the operation. On the contrary, the opinion points out the benefits accruing from such procedure. [R. 1528].

The point urged by petitioners does not, we submit present a federal question.

IV.

The Asserted Error of the State Supreme Court in Construing the State Insurance Code So as to Permit the Rehabilitation of the Business of an Insolvent Insurance Company by Means of a New Company Does Not Present a Federal Question.

Petitioners assert that the state Supreme Court after a long and "erroneous discussion" of certain New York cases, declares that the Commissioner has the implied power to rehabilitate the business of an insurance company by means of a new corporation (Pet. p. 49). They insist that the New York cases do not support the decision and further that there are no powers which may be implied from a special statute. The portion of the opinion to which petitioners refer may be found at pages 1534-1538 of the record.

Again it must be pointed out that the state Supreme Court had plenary authority to construe the California statute. The contention that such construction is erroneous does not raise a federal question.

Quong Ham Wah Co. v. Industrial Commission, 255 U. S. 445, 448;

North Laramie Land Co. v. Hoffman, 268 U. S. 276, 282.

We are not here arguing that the state law as so interpreted is constitutional, as that question will be considered later in this brief. We are here simply answering petitioners' point that the state Supreme Court committed reversible error in construing the Insurance Code so as to authorize rehabilitation by means of a company organized for that purpose by the Insurance Commissioner.

V.

The Language of Section 1043 of the Insurance Code of California Providing That the Commissioner as Conservator or Liquidator, Subject to the Approval of the Court, May Enter Into Rehabilitation Agreements Is Not Vague or Uncertain and the Section Is Constitutional.

Section 1043 of the Insurance Code provides in part as follows:

> "In any proceeding under this article, the Commissioner, as conservator or as liquidator, may, subject to the approval of said Court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, or enter into rehabilitation agreements. Such rehabilitation or reinsurance agreements shall provide that, subsequent to the date thereof and for such period of time as the Commissioner may determine, no investment or reinvestment of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the Commissioner."

Petitioners assert that the clause authorizing the Commissioner as conservator or liquidator, subject to the approval of the court, to enter into rahabilitation agreements is so vague and uncertain that any action taken under it violates the first essential of due process of law, citing *Connally v. General Construction Co.*, 269 U. S. 385; *Cline v. Frink Dairy Co.*, 274 U. S. 445; *Standard Chemicals & Metals Corp. v. Waugh Chemical Corp.*, 231 N. Y.

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51, 14 A. L. R. 1054, and *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233. (Pet. pp 49, 50; reasserted without argument, Supp. Br. p. 22.)

The first two cases cited reiterate the well-established rule, that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. The other two cases cited hold that contracts are not void because in contravention of a vague and uncertain statute. None of these decisions has any application to the case at bar.

Section 1043 of the Insurance Code neither forbids nor requires the Commissioner to enter into rehabilitation agreements. Any such agreement cannot and does not become effective until approved by the Superior Court. The agreement in this case expressly provided that it should not become binding until it should have been approved by order of the court [R. 1442]. Neither the Commissioner nor the other party to the contract is placed in the peril of conforming to a vague or uncertain law, nor are policyholders or other persons interested placed under any such peril. Petitioners, who are here asserting the unconstitutionality of said Section 1043, are not required to take any action under the rehabilitation agreement until the court has acted.

Sections 1010, *et seq.*, of the Insurance Code provide a complete scheme for the conservation, rehabilitation and

liquidation of insurance companies in jeopardy. The Commissioner is necessarily given wide discretion, but this discretion is subject to the approval of the Superior Court. The authority contained in Section 1043 is a general grant of power to the Commissioner subject to the control and approval of the Superior Court in the first instance and the revisory powers of the state appellate courts in the second instance.

In 1935, when the Insurance Code, including Section 1043, was first enacted, the term "rehabilitation agreements," when applied to insurance companies, had a well-defined meaning. The New York Insurance law made provisions for rehabilitation and, as the state Supreme Court pointed out, it is upon the New York law that the California law is modeled [R. 1535]. Months before the California legislature met in 1935, the New York Insurance law had come before the Courts of that state, notably in the *National Surety* case (*Application of People, by Van Schaick*, 239 App. Div. 490, 268 N. Y. S. 88, affirmed 264 N. Y. 473, 191 N. E. 521). In the *National Surety* case the rehabilitation approved by the courts was effected by means of a new corporation.

VI.

The Business of Insurance Is Affected With a Public Interest. The State Has an Interest in the Rehabilitation of Insolvent Insurance Companies and May Protect and Advance That Interest Through the Exercise of the Police Power.

In *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, the plaintiff contended that an act of the State of Kansas regulating its rates was violative of the 14th Amendment to the Federal Constitution. It was urged that the business was private. This Court, speaking through Mr. Justice McKenna, said:

> "To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary com-

mercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern."

233 U. S. 414-415.

The paramount interest of the state in insurance business, particularly in liquidation of insolvent insurance companies, is admirably stated in a comparatively recent decision of the California Supreme Court. *(Mitchell v. Taylor,* 3 Cal. (2d) 217.) The Court there said:

"That law provides that when there is insolvency or such situation as would make the further transaction of business by the insurer hazardous to its policyholders, its creditors or to the public, the Commissioner, with the aid of the Attorney General, shall institute a proceeding in the Superior Court placing him in possession of the company's property and seeking such other order as the interest of the policyholders, creditors and public may require. (Deering's Gen. Laws, 1931, Act 3739, Sec. 2.) Other provisions give him wide powers to carry out these purposes. There can be no doubt that the statute was enacted under the police power for a purpose connected with the public interest; that the legislature has declared the liquidation of insolvent insurance companies a matter in which the state has an interest; and that consequently it has made provision for a state officer to protect and advance that interest. The Insurance Commissioner is not a mere private trustee, or receiver wholly dependent on the appointing Court for his powers. He is a state officer, performing duties enjoined upon him by statute, and in their performance he acts on behalf of the state."

3 Cal. (2d) 218-219.

See, also:

O'Gorman and Young v. Hartford Fire Ins. Co., 282 U. S. 251;

Daniel v. Terrell (Texas), 93 S. W. (2d) 372.

In *Daniel v. Terrell, supra,* the Supreme Court of Texas held that the power of the state to fix title insurance rates operated upon contracts executed prior to the exercise of the state's power.

It follows from the authorities above cited that the business of insurance is affected with a public interest, that this public interest may be advanced and protected by the state through the exercise of the police power. Sections 1010, *et seq.*, of the Insurance Code deal with that particular phase of the insurance business having to do with the reinsurance, rehabilitation and liquidation of insurance companies in difficulties. Since the state may exercise control and regulate the rates and business of an insurance company solvent and in full operation, how much more so can it extend its assistance and protection to policyholders of an insurance company in financial difficulties. Then, most of all, the interposition of the state becomes essential.

The state, under its police power, had the right to determine under what circumstances an insurance company created under its laws could continue to do business. In the event the insurance company became insolvent or its business in a hazardous condition, the state under its police power could take over the business for the protection of all persons. Having done so, it was the duty of the state to avoid the disastrous consequences of liquidation and to preserve for the benefit of the policyholders full performance of the obligations of the contracts so far as possible. Rights of individual creditors must give way to the greater right of all creditors and to the interests of the state.

VII.

The Revised Plan of Rehabilitation and Reinsurance and the Order Approving the Same Do Not Impair Petitioners' Contracts, Deny Them Due Process of Law, Nor Deny Them the Equal Protection of the Law.

Petitioners contend (1) that the contracts of all policyholders have been impaired and that they have been denied the equal protection of the law because, they say, there never was any liquidator, consequently all of the policyholders were forced to assent to the plan or be left with absolutely nothing (Pet. p. 56; Supp. Br. pp. 23, 24).[14] They also contend (2) that their contracts have been impaired (a) because the benefits under the non-cancellable income policies have been cut down, and (b) because the New Company, without their consent, has been substituted as the other contracting party in the life policies (Pet. pp. 55, 56). Finally they assert (3) that their contracts have been impaired and that they have been denied due process of law because of the alleged unlawful discrimination between non-can policyholders and the other creditors (Supp. Br. pp. 21-25).

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[14]This contention was not urged to the state Supreme Court as is demonstrated by the fact that that Court, after a lengthy opinion in which it discussed the points raised *seriatim*, said: "We have considered *all* of appellants' contentions" [R. 1544].

A. The Alleged Non-existence of a Liquidator Did Not Impair Petitioners' Contracts nor Deny Them the Equal Protection of the Law.

Preliminarily it may be observed that the plan does not make acceptance of reinsurance compulsory on any policyholder. On the contrary, each policyholder is given the right to reject reinsurance and file a claim with the Commissioner thereafter to be appointed liquidator of the Old Company [R. 1440-1441].

It may also be conceded that no liquidator for the Old Company had been validly appointed prior to December 4, 1936, the date of the order approving the plan. The agreement was to be executed by the Commissioner as conservator and the subsequent step, that of appointing him liquidator, must necessarily follow chronologically after the approval of the plan. Both the order of December 4, 1936 [R. 1389], and the agreement itself [R. 1440-1441] contemplated that the Commissioner would in due course be appointed liquidator of the Old Company. In support of the judgment below it will be presumed that the Commissioner performed his duty and made application for liquidation, and that the Superior Court performed its duty and appointed the Commissioner liquidator.

Petitioners assert (Supp. Br. p. 23) that the fact that the Commissioner might be appointed liquidator at some future time, if it should appear to him that his efforts as conservator were futile, is immaterial; that constitu-

tional rights are guaranteed and cannot be made to depend upon the contingency of the Commissioner's discretion as to the futility of his own acts. This argument is without merit.

The Commissioner is the trustee for the benefit of all creditors and other persons interested (Ins. Code, Sec. 1057). The Superior Court may be considered the trustor (Civ. Code, Sec. 2252). If a liquidator be necessary for the complete operation of the plan and agreement, then there is an implied duty resting on both the Commissioner and the Superior Court to take the necessary steps for the appointment of the Commissioner as liquidator of the Old Company. In this regard the Supreme Court of California, in discussing the revised plan, said:

> "The proposal contemplates that in due course the Commissioner will be appointed liquidator of the Old Company and in that capacity will receive, liquidate and pay all claims against the Old Company * * *." [R. 1525.]

Obviously, in the light of the facts in this case and the decision of the state Supreme Court, the Commissioner would have no discretion except to ask for his appointment as liquidator, and the Superior Court would have no discretion except to grant such petition. Substantially all of the Old Company's assets having been transferred to, and its obligations having been assumed by, the New Company, further proceedings under Section 1011 of the Insurance Code would be futile as a matter of law (Ins. Code, Sec. 1016).

There can be no doubt that under the circumstances, if the Commissioner failed to apply for his appointment as liquidator, or, having applied, the Superior Court refused to appoint him liquidator, mandamus would issue from the state Supreme Court to compel the Commissioner and the Superior Court to perform their respective duties.

Bank of Italy v. Johnson, 200 Cal. 1, at 31;

Hilmer v. Superior Court, 220 Cal. 71, 73.

The state Supreme Court in its opinion expressly stated that dissenting policyholders

> "are allowed and will be paid the amount allowed by law as the measure of damages from the assets of the Old Company above enumerated."
>
> [R. 1539.]

If the appointment of a liquidator be necessary for the complete operation of the plan, the holding of the state Supreme Court above quoted is tantamount to a declaration that this step has been or surely will be taken. If, in order to support the judgment of the state Supreme Court it is necessary that a liquidator shall have been appointed, it will be presumed that subsequent to December 4, 1936, the Commissioner was appointed liquidator of the Old Company and that the state Supreme Court either took judicial notice of that fact or it was

called to its attention by concessions or admissions in the briefs. The opinion of the state Supreme Court does not say in so many words that a liquidator has been appointed. This is not surprising because the contention now advanced by the petitioners was not made before the state Supreme Court and is urged for the first time in their petition for writ of certiorari.

As a matter of fact, on January 7, 1937, the Commissioner filed an application in the Superior Court for liquidation of the Old Company and for his appointment as liquidator [Supp. R. fol. 1 *et seq.*]. On February 2, 1937, the Superior Court of Los Angeles County, per Judge Willis, made its order for liquidation appointing the Commissioner liquidator of the Old Company [Supp. R. fol. 99, *et. seq.*,]. Petitioners' appeals from said order [Supp. R. fol. 107; fol. 3 (L. A. No. 16245); fol. 3 (L. A. No. 16246).] are still pending and undetermined in the state Supreme Court.

Petitioners admit that the state Supreme Court held that the plan of rehabilitation contemplated the appointment of a liquidator but, they say, that fact is of no importance. They assert that their appeals taken from the order of December 4, 1936, to the Supreme Court of California deprived the trial court of jurisdiction to appoint a liquidator or to take any further action in the case (Supp. Br. p. 24).

It is not necessary to determine whether or not petitioners' assertion is a correct statement of the California law. If it be correct it means simply this, that the order of December 4, 1936 (admittedly contemplating the prompt appointment of a liquidator by a court then having jurisdiction to do so) impairs petitioners' contracts by failing to provide a liquidator when they themselves made such appointment temporarily impossible by taking an appeal from said order of December 4th.

The alleged non-existence of a liquidator does not furnish any ground for reversal. If the plan and the order of December 4, 1936, are otherwise unobjectionable, then the said order should be affirmed, for under petitioners' own theory the contemplated appointment can thereupon be made with due promptness. In short, petitioners have no need of a liquidator until it is determined by this court in this appeal whether or not petitioners are bound by the plan, at which time the Superior Court, under petitioners' theory, will be in a position to make, and for the reasons above given presumably will make, the contemplated appointment of a liquidator.

There is, therefore, no basis for petitioners' claim that their contracts have been impaired or that they have been denied the equal protection of the law because of the alleged non-existence of a liquidator with whom petitioners could file claims.

B. PETITIONERS' CONTRACTS HAVE NOT BEEN IMPAIRED.

1. *Petitioners Have No Vested Right in any Form of Remedy nor to Insist on Liquidation Instead of Rehabilitation. All They Are Entitled to Is the Equivalent of What They Would Have Received on Liquidation.*

Manifestly, none of petitioners' rights has been invaded by reason of the fact that the State of California, acting through the Commissioner of Insurance, took proceedings in July of 1936, under Sections 1010 *et seq.* of the Insurance Code dealing with conservation, liquidation and rehabilitation of insurance companies in jeopardy. So long as the Old Company was a going concern the policyholders had the right to have their contracts performed according to their face, but a circumstance intervened over which the state had no control and for which it was in nowise responsible, namely, the insolvency and hazardous condition of the Old Company. It could not continue to operate and the policyholders had no constitutional right to require it to operate. The Old Company's insolvency being a fact, the policyholders no longer had the right to compel a full performance of the policy obligations. All that they were entitled to was the equivalent of what they would have received on liquidation.

The policyholders were not entitled to any particular form of remedy at the hands of a particular state official, nor to insist on complete liquidation instead of rehabilitation. There is no property right in the constitutional sense in any form of remedy.

Gibbes v. Zimmerman, 290 U. S. 326;

Doty v. Love, 295 U. S. 64.

2. *As the Appeals Were Taken on the Judgment Roll and No Evidence Is Brought up, It Must Be Presumed That Assets Held by the Commissioner Will Be Sufficient to Pay the Dissenters as Much as, or More Than, They Would Have Received on Liquidation.*

The approved plan, as we have said, gave to policyholders of all classes the right to reject reinsurance and to file their claims with the Commissioner thereafter to be appointed liquidator.

The question, therefore, arises: Will dissenters, under the plan, receive the equivalent of what they would have received on complete liquidation? The state Supreme Court was of the opinion that the presumptions from the record required an affirmative answer to this question —that dissenters are allowed and will be paid the amount allowed by law [R. 1539].

The Commissioner, both as conservator and as liquidator, was a trustee for the benefit of all creditors (dissenters as well as consenters) and all other persons interested in the estate of the Old Company (Ins. Code, Sec. 1057). Upon his appointment as conservator he became vested with all of the assets of the Old Company. Under the rehabilitation and reinsurance agreement embodied in the approved plan he became obligated to, and presumably did, transfer to the New Company all of such assets, excepting the stock of the New Company and rights of action against the officers and directors of the Old Company and upon their fidelity bonds. The agreement, however, provides that the New Company shall pay or deliver to the Commissioner as liquidator the reserves established by the New Company behind each

policy held by a policyholder who rejects reinsurance. In addition, the New Company obligated itself to pay to the Commissioner for the benefit of dissenters a part of the future profits of the New Company. The Commissioner, as trustee, continues to hold the following assets:

(a) The stock of the New Company;

(b) Rights of actions against the officers and directors of the Old Company and upon their fidelity bonds;

(c) The obligation of the New Company to pay or deliver to the Commissioner the reserves behind each policy whose holder dissents;[15]

(d) The obligation of the New Company to pay to the Commissioner a proportionate share of substantially all of the net profits of the New Company from all its Departments, except the participating department, and 10% of the net profits from its assumed participating life policies.

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[15]Dissenters obtain the benefit of the liquidation of their share of the reserves through a going concern, the New Company. The New Company is obligated to pay such share to the liquidator in cash or deliver such share in kind selected by, and at a valuation satisfactory to, the Commissioner. If such share is delivered in kind, the Commissioner has a right at any time to require payment in cash or the substitution of other securities or assets at the valuation at which the first assets were received [R. 1424]. The New Company either pays in cash or in effect guarantees the value of the assets transferred in kind.

Although a trial was had lasting more than six weeks, none of the evidence was brought before the state Supreme Court and none of the evidence is before this court. The record does not disclose the value of the assets above listed. The record is also silent as to what amount the policyholders would have received had the business and assets of the Old Company been liquidated. The record does affirmatively show, however, that under the approved plan the assets are far in excess of what they would have been on liquidation [R. 1386]. In support of the order of the Superior Court, the state Supreme Court assumed that evidence was introduced on these vital points and that such evidence demonstrated that dissenters under the plan would receive as much as, or more than, they would have received on liquidation, and that the recitals of the order appealed from, that adequate provision is made in the plan for each class of policyholders, were amply supported by evidence [R. 1539]. This court must indulge in the same presumption. (Compare *O'Gorman & Young v. Hartford Insurance Co.*, 282 U. S. 251, 256-258.)

Moreover, the Superior Court adjudged that operations under the plan were feasible[16] and afforded a feasible method of providing within a reasonable time full restoration of the benefits under the non-cancellable income policies [R. 1387]. The obligation of the New Company to pay funds or deliver securities to the Commissioner sufficient to pay all of the claims in full becomes absolute

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[16]It was the exclusive function of the Superior Court to determine the feasibility of the plan. (*In re Hession* (C. C. A. 7th) 97 Fed. (2d) 902, 905; *In re Llewellin* (C. C. A. 7th) 86 Fed. (2d) 588, 590.)

and unconditional when the assumed non-can policies are fully restored [R. 1424]. The last mentioned adjudication of the Superior Court is, therefore, tantamount to a recital that the plan affords a feasible method of providing within a reasonable time full payment of all claims filed with the liquidator.

3. *If it Be Assumed That Assets Presently Payable or Deliverable to the Commissioner for the Beuefit of Dissenters Are Not Sufficient to Pay to Dissenters the Amount They Would Have Received on Liquidation, the Most That Can Be Said Is That Some Small Portion Thereof Has Been Placed at the Risk of the Business of the New Company for the Dissenters' Own Benefit, and This Is Not Unconstitutional.*

It will be observed that the obligation of the New Company to pay or deliver to the Commissioner as liquidator the reserves behind each policy whose holder dissents is not contingent upon profits to be earned by the New Company. The plan contemplates that the New Company will either make the collections and pay the share in cash or, in effect, will guarantee the value of assets turned over in kind at a price satisfactory to the Commissioner [R. 1424]. Said share of the reserves were free of expenses of conservatorship and liquidation expenses (including attorneys' fees) and were free from all preferred tax claims [R. 1421 and 1425-1426]. In the light of the recitals of the order here under review, namely, that there is no discrimination and that the assets will be more valuable under the plan than if sold on liquidation [R. 1386], it is to be presumed that the reserves so paid or delivered to the Commissioner for the benefit of dis-

senters will alone be greater than the dissenter's share on liquidation under forced sale. Even if it be assumed that such is not the case, then the most that can be said is that some portion of the assets, the proceeds of the forced sale of which on liquidation would be available for the claims of the dissenters, is placed at the risk of the business of the New Company.

But the mere fact that assets, which on liquidation would have been available for the payment of claims, are placed at the risk of the business of the New Company does not contravene the Federal Constitution.

Doty v. Love, 295 U. S. 64.

In *Doty v. Love,* an insolvent state bank, after being closed for several years, was reorganized under an act of the State of Mississippi passed after the bank became insolvent. Under this law the superintendent of banks, acting under the direction of the court of chancery, was permitted to form a new bank to take over and operate the business of the closed bank. At the time that the reorganization was proposed and approved by the court, all of the preferred claims had been paid. Stated as simply as possible the plan was as follows: The new bank assumed 25% of all of the remaining claims against the old bank, except claims of $5.00 or less, aggregating about $3600.00, which were assumed in full. In consideration of this assumption, assets in excess of the value of the proportionate amount of claims assumed were transferred to the new bank. Stockholders of the old bank purchased the stock of the new bank and contributed new money for that purpose and were relieved

of the stockholders' liability under the stock of the old bank. Assets of the estimated value of $45,000 belonging to the old bank were transferred to the new bank as a surplus for the capital account. The balance of the assets of the old bank were placed in a pool to be administered by the new bank as trustee for the creditors of the old bank and in this pool they shared ratably. The plan was compulsory upon all the creditors of the old bank. Two non-consenting depositors appealed to the Supreme Court of Mississippi, where the judgment was affirmed. (172 Miss. 342, 155 So. 331.) On appeal to this court it was urged, among other things, that appellants' pro rata share of the fund of $45,000.00 was placed at the risk of the business of the new bank. Article I, Section 10 and the Fourteenth Amendment of the Federal Constitution were invoked. It will be observed that this fund of $45,000.00 and the non-consenters' pro rata share thereof became part of the capital structure of the new bank and liable on a one hundred per cent basis for the new business of the bank. Non-consenters took the risk that this sum of $45,000.00, which was to be repaid to the depositors of the old bank out of profits, might never be repaid, either because of insolvency of the new bank or because no profits were enjoyed for a long period of time. But this was held not to infringe the Federal Constitution. The court said:

> "The argument is made that some of the assets of the old bank are placed at the risk of the business of the new one. All this was done for the protection of existing creditors. The finding is that collections

are made more promptly and readily by a going concern than by one in liquidation. Cf. *Christensen v. Merchants & Marine Bank of Pascagoula,* 168 Miss. 48, 57, 150 So. 375. For illustration, a live bank is more efficient than a closed one in selling parcels of real estate or in carrying them while unsold at profitable rentals. Adequate precautions are embodied in the plan to assure the enjoyment of these benefits by the creditors and not by others. It is one of the terms of the decree that none of the profits of the business may be used for the new shareholders until every dollar's worth of assets turned over by the superintendent has been paid to the creditors or delivered to the pool. The court may intervene upon a showing of unreasonable delay. There is no need to consider whether any of these safeguards might have been omitted without invalidating the plan. We take the record as we find it."

295 U. S. 71-72.

It should also be noticed that in the case at bar under no possible contingency will the stockholders of the Old Company receive one penny until every creditor has been paid in full, and the reserves are adequate for the full restoration of all benefits under the policies the holders of which elect reinsurance. By making this provision the plan avoids the objections found by this court to exist in the Northern Pacific reorganization (*Northern Pacific R. Co. v. Boyd,* 228 U. S. 482, cited by petitioners, Pet. p. 53).

C. THE APPROVED PLAN DID NOT DENY TO PETITIONERS DUE PROCESS OF LAW. IT WAS NOT UNJUSTLY OR UNLAWFULLY DISCRIMINATORY.

Holders of non-can policies, as we have said, have been extended the option to dissent and file claims, or to accept reinsurance by the New Company at scaled-down amounts. Other policyholders are given the option to dissent and file claims or to have their policy obligations fully assumed. The second question, therefore, arises: Is the plan unjustly discriminatory as to any class of creditors?

In determining whether the plan is unjustly discriminatory we must consider (1) the problem presented to the Commissioner and the objectives which equitably ought to be his goal; (2) the possible solutions available to the Commissioner, and (3) the extent to which the approved plan solves the problem and most nearly attains said objectives.

1. *The Problems Presented to the Commissioner and the Objectives Which Ought To Be His Goal.*

When the Commissioner, in July of 1936, found that the Old Company was insolvent and its business in a hazardous condition, it became necessary for him to take steps to protect the rights of all persons interested for whom he was the statutory trustee. The Old Company could not continue in active business [R. 849].

The Commissioner found that the Old Company had assets of the book value in excess of $200,000,000.00 [R. 5]; that it had obligations on policies issued and outstanding in excess of $600,000,000.00, insuring the lives of approximately 200,000 or more persons, and that it also had accident and health policies outstanding insuring an additional 75,000 persons [R. 6].

The Old Company had intangible assets of very considerable value, consisting of good will, going concern value and agency organization [R. 1386]. The Old Company's life policy business was very profitable [R. 846], and its commercial health and accident business had in recent years earned a profit of several hundred thousand dollars [R. 847]. The Old Company's insolvency was principally caused by the fact that it had been issuing non-cancellable health and accident policies at an inadequate rate. The Commissioner was faced with the fact that insurance is a public asset, a basis of credit and a vital factor in business activities, and that it provides income for the aged and subsistence for the widow and orphan.

The public policy of the state, as expressed in the Insurance Code, required the Commissioner to take active steps

The Commissioner's objectives were to preserve, if possible, the profitable business of the Old Company and the valuable intangible assets; to avoid a forced sale of the assets, and to secure as far as possible the benefits to policyholders provided in their contracts of insurance as fairly and as fully as the circumstances permitted.

At the direction of the court the Commissioner, in August of 1936, began a conference with interested parties and their attorneys. During this conference he gave diligent study and attention to the problems presented, he made diligent inquiry among possible reinsurers or purchasers for the purpose of determining what avenues were open. He invited the presentation of plans or offers and carefully examined and considered all plans and suggestions submitted to him [R. 851-852].

2. *The Commissioner Had Three Possible Solutions: (a) Complete Liquidation (Which Would Be Disastrous); (b) Ratable Assumption of All Policies (Which Would Destroy Intangible Assets and Would Merely Amount to Deferred Liquidation); and (c) a Plan of Rehabilitation by Which the Intangible Assets and the Profitable Business of the Old Company Would Be Preserved for the Benefit of All Creditors.*

The Commissioner had several options open to him.

First, and most obviously, he could completely liquidate the Old Company. Liquidation, however, would not solve the problems or attain the objects in view. It would be disastrous. The intangible assets would be lost along with the profitable business. The policyholders would have no option but to accept their distributable share of the assets, which on liquidation would be worth far less than on rehabilitation. Liquidation was something to be avoided if at all possible, as the public policy of the state, expressed in the Insurance Code, clearly demonstrates [R. 1534]. Obviously, since the Old Company was insolvent and since its tangible assets would bring substantially less on forced sale than if sold as a part of a going concern [R. 1386] and its valuable intangible assets would be entirely lost, the policyholders in the event of liquidation would receive less than the face amount of their provable claims and would never receive the performance of the obligations for which they had contracted.

Complete liquidation would have treated all creditors ratably and if the Commissioner had taken this easier path no claim could have been made of an unconstitutional infringement of the policyholders' rights, but the price paid by the creditors for this equality would be ruinous.

Secondly, the Commissioner could have reduced all policies ratably and thus preserved a theoretical equality among the creditors, but such option had insurmountable disadvantages and would not attain the beneficial objects sought to be gained. The holders of life policies who were still insurable risks would be induced by any such plan to surrender their policies and take insurance in other companies. On the other hand, those policyholders who were no longer insurable would tend to keep their insurance, even at the reduced benefits. The risks still insurable (which constitute the profitable business of the Old Company) would be lost and the unprofitable risks would remain an obligation at the reduced amounts. The Old Company obviously wrote insurance on the normal life expectancy tables. These tables assume that only normal surrenders and lapses of policies will occur, and that most of the risks which continue to be good risks will remain with the Company, thereby offsetting the risks which become poor ones. If, as a result of the reduction of the face amount of all policies, the good risks were lost, the normal experience tables would no longer reflect the mortality experience of the New Company and the reallocated reserves would tend to become insufficient. The result would be that the New Company would become insolvent because of inadequate reserves. In short, placing a ratable lien upon all policies or reducing ratably the amount of benefits on all policies might postpone liquidation temporarily, but would tend to make liquidation inevitable. Moreover, the valuable good will and agency

organization would be lost. It would, indeed, be difficult to write new business if the face amount of the life policies had been reduced proportionately.[17]

Any plan which provided for the ratable reduction of all policies would, as we have said, give a theoretical equality to all policyholders, life policyholders and non-can policyholders, dissenters and consenters, but obviously under such a plan the dissenter who elected to reject reinsurance at the ratably reduced amount and desired to file a claim would receive only the amount which he would have received if the company had been completely liquidated which, as we have suggested, would be less than the amount of his provable claim. A dissenter could not reasonably expect any share of the future profits of the business (whether operated by the Old Company or by a new company), for he had contributed nothing and was entitled to no further benefits.

A plan calling for ratable reduction of the face of all policies would not only make liquidation inevitable, with the attendant loss of benefits and disastrous consequences, but it would deny to the dissenter any hope of receiving his full measure of damages.

Thirdly, the Commissioner had the option to rehabilitate under a plan similar to the one approved. The New Company formed in rehabilitation could not assume one hun-

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[17]The State Supreme Court held that the evidence might well have shown that a ratable reduction of all policies would have many of the results above suggested [R. 1540].

dred per cent all of the obligations of the Old Company, for, if it did, the New Company would itself be insolvent. (*Thrower v. Kistler,* 14 Fed. Supp. 217.) It could not assume all of the obligations ratably and proportionately without the disadvantages mentioned in the discussion of the second option and the probability, if not certainty, of merely deferring the day when the New Company would, itself, become insolvent and have to be liquidated.

Since, for the reasons stated, the New Company could not assume all policies in full and, as a practical matter, could not assume all policies in part ratably and proportionately, there was but one alternative,[18] namely, the unconditional assumption of certain of the policies in full, and the conditional assumption in part of other policies with an obligation to restore these latter policies from the profits of the New Company.

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[18]There may have been other options open to the Commissioner. If there were, it will be presumed that they, as well as the first and second options, were considered by him and discarded for valid and substantial reasons [R. 852, 1271]. We do not suggest reinsurance by an established life insurance company as an option open to the Commissioner, because the principal plan of reinsurance (the so-called Giannini plan [R. 1350 *et seq.*]) was based fundamentally on the same principle as that adopted in the approved plan, namely, that the non-can policies should be scaled down. Moreover, in the light of the record, it was impossible for the state Supreme Court to consider the relative merits of the other plans submitted [R. 1544], and this court, not having any evidence before it, is in no better position.

3. *The Commissioner Submitted, and the California Courts Approved, the Revised Plan of Rehabilitation Whereby Liquidation (Either Immediate or Deferred) Was Avoided, and the Intangible Assets and Profitable Business Preserved for the Benefit of All Policyholders, Particularly the Holders of Non-can Policies. The Difference in Treatment Between Non-can Policyholders and Other Policyholders Was Necessary, Fair and Just and There Was No Unlawful or Unconstitutional Discrimination Against Them.*

Such were the problems and the objectives and the remedies available to the Commissioner. He adopted a plan conforming to the third option, presumably for reasons suggested above or other valid and substantial reasons supported at the trial by competent evidence.

In determining which policies should be assumed in full and which should be partially assumed, practical considerations made necessary that the non-can policies should be only partially assumed. Holders of non-can policies had been getting coverage at inadequate premium rates. The inadequacy of the premiums on the non-can policies stamped them as a burden rather than as a profit. These policies constituted the only unprofitable business which the Old Company had.

On the other hand, the life policy and the *commercial* health and accident business of the Old Company was very profitable. If this business could be conserved, if the life policyholders could be induced to continue their insurance and pay their premiums, if because this business had been completely assumed new business of similar nature would be encouraged (and it

is plain from the plan that the New Company does not contemplate writing new non-cancellable policies), then profits would be assured to the New Company and from these profits the plan contemplates that the consenting non-can policyholders will eventually be made whole and their benefits fully restored, and the dissenters who have filed claims will eventually be paid more than they would have received on complete liquidation, to-wit, the full amount of their measure of damages.

It must always be borne in mind that the vast majority of life policyholders must continue to pay premiums (and thereby be debtors of the insurance company) if they desire to obtain the full benefits of their policies. The very fact that the life policies were assumed in full and that the New Company's reserves behind these policies are entirely adequate, would induce life policyholders to continue the payment of their premiums, would discourage abnormal lapses, and would encourage new life business.

There is an important factor in this case which must never be lost sight of. The intangible assets, consisting of goodwill, going concern value and agency organization, which are of considerable value, by their very nature inhere in and are appurtenant to the profitable business of the Old Company. The record distinctly shows that the non-can policy business has been unprofitable and will always be unprofitable. It is a contradiction of terms to say that there is any going concern value to the non-can business which, by its very nature, can never earn a profit but has led to disaster.

Another factor of equal importance is that these intangible assets can be preserved only if the obligations of the profitable business are assumed in full. A life insurance company differs from the ordinary business. The goodwill and going concern value of a life insurance company are inseparably connected with the policyholders of the company who are its creditors. In the case of an ordinary business the goodwill and going concern value rest with the customers who are usually not the creditors, the creditors being an entirely different class and, moreover, the good will is somewhat speculative. In the life insurance business the customers are the creditors and the good will not only has reference to new business in the future, but is largely non-speculative because it inheres in business already on the books. Obviously, anyone taking over the profitable business, in order to make the value of that business any more than the forced sale value of the assets allocated to the profitable business—in order to preserve the going concern value, goodwill, agency organization and probability of future profits—must necessarily assume the obligations of this profitable business in full, otherwise the intangible assets are lost. The plan, by providing for the assumption of the obligations of the profitable business in full, thus preserves the valuable intangible assets, which would have been lost on complete liquidation.

The third important factor which must be borne in mind is that these intangible assets, which make possible the reasonable expectancy of future profits, are pledged

primarily for the benefit of consenting non-can policyholders and for the benefit of dissenters of all classes.

An analysis of the approved plan shows that it avoids immediate liquidation and a forced sale of assets and will avoid so far as possible deferred liquidation. It conserves the intangible assets and the profitable business of the Old Company. It makes possible with reasonable certainty the continuation of the New Company and the writing of new business. It presents and affords a feasible method of providing within a reasonable time full restoration of the benefits under the non-cancellable income policies [R. 1387] and therefore payment to dissenters of more than they would receive on liquidation, namely, the full face amount of their provable claims. It subordinates the rights of the stockholders to the rights of the creditors.

It is obvious from the plan and agreement that the New Company assumed the very largest obligation it could assume and still remain solvent. The plan was as fair a plan as was possible under the circumstances and still provide for the retention of the benefits it was intended to and does conserve, which benefits inure to all policyholders, consenters and dissenters alike.

The case at bar does not present a situation where there has been an arbitrary, unreasonable, unnecessary and non-beneficial difference in treatment between the creditors. The difference in treatment was justified for the reasons we have given above.

In closing our argument under this heading we cannot overemphasize the fact that acceptance of reinsurance was

not compulsory on any class of policyholders; that the plan and agreement avoids the disastrous consequences of liquidation, either immediate or deferred, and provides a fair and feasible method affording an opportunity of full payment of claims of dissenters and full restoration of benefits to the holders of non-can policies; that the plan and agreement avoids the disastrous consequences of forced sale of assets upon liquidation, conserves and preserves the valuable intangible assets and continues the profitable business as a going concern; and that complete assumption of the obligations of the profitable business was necessary to conserve the going concern value and make reasonably certain profits for the New Company, which profits largely inure to the benefit of the non-can policies whose holders consented to the plan, and to the dissenters. The difference in treatment was justified and, while it was beneficial to the holders of life policies who consented to the plan, that was not its principal object. The object was to provide a fund which would inure to the benefit of the non-can consenters as well as dissenters of all classes. The option selected by the Commissioner and approved by the Superior Court and the state Supreme Court was, as declared by both courts, fair, just and equitable and did not unlawfully or unjustly discriminate between any classes of creditors. The principle adopted in the plan and agreement was necessary under the circumstances and was the only principle which would avoid the disastrous consequences of liquidation and forced sale and preserve valuable assets.

VIII.

Apart From the Benefits Secured to the Non-Can Policyholders and Dissenters of All Classes, the Plan Was Entirely Equitable. The Decided Cases Show a Pronounced Trend Toward the Broad, Equitable Principle That Policyholders in Each Class Have a Preferred Claim to the Reserves Behind Their Policies, Over the Rights of the Policyholders of Any Other Class. The Court Should Not Hesitate to Apply This Principle to the Situation in the Case at Bar.

It is a recognized principle that the policyholder has a definite claim upon the reserves created by his premiums. The fundamental idea of the level premium plan is that the cost of insurance shall be equalized throughout the life. The excess of the premium payment over the actual cost of insurance in the earlier years is advance payment for the growing cost of the insurance in the later years and is a contribution to the reserves behind the policy. The theory of premium computation and reserves is set forth in considerable detail in *U. S. Life Insurance Co. v. Spinks* (Supreme Ct. of Ky.), 96 S. W. 889, and in *New York Life Insurance Co. v. Statham*, 93 U. S. 24.

The proprietary interest of the life policyholder in his policy reserves is recognized in many decisions—even where the policy did not provide for cash surrender and automatic nonforfeiture values.

In *New York Life Insurance Co. v. Statham, supra,* the court said:

> "This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings bank is said to belong to the person who made the deposit. * * *
>
> "To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor."
>
> 93 U. S. 34-35.

The California Supreme Court, in an action on a life policy to enforce nonforfeiture rights, said:

> "The purpose and object of the statute was to prevent a forfeiture of a policy by nonpayment of premiums, when there was a fund in the hands of the insurer *belonging to the insured* which might be applied to extend the insurance or purchase a paid-up policy. * * *
>
> "The statute was clearly intended to give the insured the benefit of such reserve, or surplus, by having it applied upon an extension, or a reinsurance, instead of having it returned to him."
>
> *Nielsen v. Provident Savings Life Assurance Society of New York,* 139 Cal. 332, 337 and 338.

In *Henricks v. Metropolitan Life Insurance Company*, 7 Cal. (2d) 619, the California Supreme Court referred approvingly to *Inter-Southern Life Ins. Co. v. Omer* (Kentucky), 38 S. W. (2d) 931. In that case the Kentucky Supreme Court said:

> "A portion of the premiums paid is used to establish a reserve fund for the satisfaction and payment of the policies. * * * The recognition of the policyholder's interest in the reserves, that is, the portion which has been allotted to his policy, is demanded, and its forfeiture or confiscation prohibited by statutes enacted by most if not all the states under the police powers of government."
>
> 38 S. W. (2d) 935-936.

This court in *Maryland Casualty Company v. United States*, 251 U. S. 342, said:

> "Reserves, as we have seen, are funds set apart as a liability in the accounts of a company to provide for the payment or reinsurance of specific, contingent liabilities. They are held not only as security for the payment of claims but also as funds from which payments are to be made."
>
> 251 U. S. 352.

We do not wish to be misunderstood as asserting that any of the foregoing cases deal with factual situations analogous to the case at bar, for in none of the cases above cited was the court called upon to decide the relative rights of two classes of policyholders in the event of liquidation or rehabilitation. But we do most earnestly contend that they are guide-posts pointing unerringly to the fact that policyholders have a recognized and enforcible equity in the reserves behind their policies.

But an additional step was recently taken by the New York Court of Appeals in the case of *Rhine v. New York Life Insurance Co.*, 273 N. Y. 1, 6 N. E. (2d) 74, affirming 248 App. Div. 120, 289 N. Y. S. 117, followed and approved in *Rubin v. Metropolitan Life Insurance Co.*, 251 App. Div. 382, 296 N. Y. S. 908, affirmed 278 N. Y. 155, 16 N. E. (2d) 293. The *Rhine* case is important, and while it does not involve rehabilitation or liquidation, it is in point on principle and points unerringly, we believe, to the conclusion that the Superior Court herein was correct in making the order appealed from and the state Supreme Court correct in affirming the same.

In *Rhine v. New York Life Insurance Co., supra,* Mrs. Rhine held an ordinary life policy in the face amount of $2000.00. She exchanged this policy for two policies of $1000.00, each containing a disability clause. The premiums on each policy were exactly $2.96 higher than the premiums would have been if the policies had not contained the disability clause. Both policies participated in the profits of the company and were entitled to be paid policy dividends. For a number of years the dividends on both policies were identical with dividends on policies of the same amount and age class which did not contain a disability clause. But the experience of the company indicated that whereas the life business earned a profit, a different situation resulted in respect to the disability business, as to which the company was suffering a deficit. Prior to 1931 the company, in computing policy dividends, bulked all life policies of a given age class together, irre-

spective of whether the policies were with or without the disability clause. In 1931 it separated its life policies into two general classes—one, policies without the disability clause, and the other, policies with the disability clause. The result was that the policy dividends on life policies without a disability clause were larger than the dividends on life policies containing a disability clause. Plaintiff contended that both her policies should be treated in the same manner as if they had not contained a disability clause, and brought action to recover the difference in policy dividends. While the amount involved was merely nominal, the court of appeals pointed out that if the plaintiff's contentions were correct, the company would have to pay policy dividends of $15,000,000.00 among 1,600,000 policyholders. The court approved the plan followed by the insurance company and affirmed the judgment in its favor made by the Appellate Division, which had affirmed the judgment in the trial court in favor of the defendant.

This case is a clear recognition of the fact that a policyholder is entitled to policy dividends in accordance with the contribution he makes to the reserves behind his policy, and that a life policy without a disability clause may be put in a class different from a life policy with a disability clause. The importance of the case lies in the fact that the New York statute required that participation dividends should be "equitably" made (6 N. E. (2d) 75). The court refused to follow plaintiff's technical argument based on the wording of her policy, but employed broad equitable principles to reach a result which was fair to the policyholders as a whole. It is obvious that if a contrary result had been reached, holders of life

policies without a disability clause would have been contributing toward dividends of policyholders who enjoyed the additional protection.

It is interesting to note the history of the disability clause as set forth in the opinion, and particularly the fact that several great insurance companies found that disability insurance was impracticable and have discontinued issuing such policies.

Rhine v. New York Life Insurance Co. does not involve a liquidation or rehabilitation proceeding. But it does recognize the broad equitable principle that a policyholder has rights in the reserves behind, or created by, his particular kind of policy, and that a classification between policyholders is permissible in determining the amount of policy dividends.

It is really no step at all from *Rhine v. New York Life Insurance Co.* to the case at bar. The record clearly shows that the deficit arose by reason of actuarial undercalculation of the premiums payable on the non-can policies. For years the non-can policyholders had been getting insurance at bargain rates. The life policyholders have paid adequate premiums and will continue to do so in the future, contributing, under the Commissioner's approved plan, to making good the face amounts of the non-can policies.

The case here presented is an unusual one. The Old Company's business, in all departments except the Non-can Department, was profitable and in a flourishing condition. But by reason of the deficit in reserves behind the non-can policies, it could not continue in California or most of the other states in which it did business. The problem presented was in many ways unique, and while,

as we will presently show, there are precedents in New York for the act taken by the Commissioner, nevertheless upon principle the state courts were justified in approving the Commissioner's revised plan.

The unusual circumstances in this case would have required the approval of the plan upon the application of broad principles of equity, even if no precedents squarely in point exist. The California Supreme Court recently announced that principle of law, in no uncertain terms, when, in *Times-Mirror Co. v. Superior Court,* 3 Cal. (2d) 309, it said:

> "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. 'It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication.' (Humboldt Sav. Bank v. McCleverty, 161 Cal. 285 [119 Pac. 82], citing Story's Equity Jurisprudence, secs. 28, 439; 1 Pomeroy's Equity Jurisprudence, sec. 60.)".
>
> 3 Cal. (2d) 331.

It is obvious from the record that the Insurance Commissioner of the State of California, on whom the initiative lay, molded and adjusted the revised plan of rehabilitation so as to do substantial justice in the complicated situation presented to him. The Superior Court, after a six-weeks trial, approved the plan as fair, just and equitable, and the state Supreme Court has affirmed that order.

IX.

Similar Proceedings Have Been Upheld in Other Jurisdictions.

Perhaps one of the leading cases in the United States on the rehabilitation of an insurance company is *Re National Surety Company*, 268 N. Y. S. 88, affirmed by memorandum opinion, 191 N. E. 521, on the authority of *People v. Title & Mortgage Guarantee Co. of Buffalo*, 190 N. E. 153. In New York the Superintendent of Insurance, as a first step, becomes a rehabilitator. As rehabilitator he performs the duties of a conservator as it is known under the California statute. Rehabilitation under the New York law includes conservation as well as rehabilitation in the sense in which it was used in the proceedings below. The *National Surety* case involved rehabilitation in the latter sense. It is particularly in point as there was an alleged discrimination in favor of surety business which could be taken over by the new corporation and carried on at a profit.

The Superintendent of Insurance of the State of New York found that National Surety Company, a New York corporation, was insolvent. However, the company was engaged in a nation-wide business of great magnitude and had a good will of great value, and the Superintendent moved swiftly to preserve the business and conserve the assets.

As statutory rehabilitator under court appointment, he proposed a plan to conserve the assets of the company by organizing a new corporation designated "National Surety Corporation," with a capital of one million dollars and a surplus of three million dollars paid in from the assets of National Surety Company in exchange for all of the stock

of the new company which was issued in the name of the rehabilitator for the protection of all concerned; by having the new company assume a portion of the liabilities of the old company; by creating a second corporation to liquidate certain mortgage guaranties of National Surety Company out of certain assets transferred to that corporation by the company; and by creating a third corporation to take over certain frozen assets of National Surety Company and to pay therefrom obligations not assumed by National Surety Corporation or by the corporation liquidating the mortgage guaranties. The losses assumed by National Surety Corporation were only those which would occur after May 1, 1933, under various insurance contracts of National Surety Company.

It was contended by certain policyholders that the plan was inequitable, illegally discriminatory and unconstitutional. It was held, however, that "rehabilitation" means conservation of assets and resumption of business; that rehabilitation was a step toward the removal of the causes which made the state proceeding necessary; that the statute empowered the Superintendent of Insurance to act quickly and contemplated that he would so act to preserve the going concern values; that rehabilitation required a wise use of discretion by the Superintendent; that the legislature had the power to permit the Superintendent to rehabilitate or liquidate an insurance company; that a new company could be organized to receive the assets of the company in rehabilitation and to save its good will and profitable business; that the assets of the company so transferred could be so used for the purpose of rehabilitation; that the new company and the transfer to it constituted a proper method of safeguarding the rights of creditors; that the court must rely to a great extent on

the Superintendent who had the facilities to acquire information with reference to the needs of the situation and that the plan seemed to the court to be feasible and was an act of conservation for the benefit of all concerned; and that rehabilitation accomplishes a great public service.

Re National Surety Company, 268 N. Y. S. 88.

An appeal was taken from the order of the Supreme Court approving the plan of rehabilitation, and the holding of the lower court was affirmed, the upper court declaring that the Superintendent had the power to adopt the plan and that the plan was a proper exercise of that power.

Re National Surety Company, 191 N. E. 521, following

People v. Title & Mortgage Guarantee Co. of Buffalo, 190 N. E. 153.

Thereafter the National Surety Company rehabilitation plan was subjected to attack in Kentucky where the company had been engaged in business and where the new company, National Surety Corporation, had been licensed to carry on the business of the old company. Referring to the plan, the Kentucky court said that it evidenced "fairness toward the holders of claims as well as due consideration for the protection of their rights"; that the new company became possessed of the valuable good will of the old company and thereby were preserved the potential profits that might arise from the continued operation of the business of the old company; that the good will and those potential profits would have been completely lost if

the old company had gone into liquidation; and that the plan effected the greatest possible salvage of the assets of the old company.

It was also held, upon the authority of *Hartford Life Insurance Co. v. Ibs,* 237 U. S. 662, that the intervention of creditors in the New York rehabilitation proceeding was for the benefit of all the creditors of the respective classes and gave the New York court jurisdiction of all creditors of all those classes; and also that personal service of process was unnecessary and that the order of the New York court, having jurisdiction of the subject matter and the various creditors, was binding upon all creditors wherever residing and was entitled to full recognition in Kentucky under the full faith and credit clause.

National Surety Corp. v. Nantz, 90 S. W. (2d) 385.

The legality of the National Surety Company rehabilitation plan was also challenged in the United States District Court for South Carolina. That court observed that National Surety Company was faced with immediate liquidation or reorganization; that a forced liquidation would probably have resulted disastrously to creditors and probably would have meant "the complete sacrifice of the good will of the company built up over many years and its value as a going concern"; that liquidation would have had a "terrifying effect on other surety companies, thus further paralyzing the business of the Nation"; and that "liquidation would have been destructive of the interests of the creditors."

Of the New York plan of rehabilitation the District Court said that National Surety Corporation was created "for the purpose of continuing the business of the old

company as far as practicable and to preserve from the disastrous effects of forced liquidation many of its valuable assets"; that "a large part of the value of a surety company is its good will as a going concern, and upon liquidation such value entirely disappears"; that "by continuing the business, with the same agency setup, the demand for return premiums is in the main eliminated, and there is no serious interruption of the normal flow of business"; and that the new company could not assume all the liabilities of the old company, "for if it had done so there would have been no substantial change in the status and the new company would have been unable to function."

Thereupon that court concluded that the rehabilitation transaction was entirely free from fraud or any other unlawful conduct on the part of the New York Superintendent of Insurance or the old company; that the creditors of the old company became the owners of the business of the new company; that the new company was a going concern, with reasonable prospects of success; and that in liquidation little or no salvage could have been expected.

Thrower v. Kistler, 14 Fed. Supp. 217.

Doty v. Love, 295 U. S. 64, has already been cited and relied on earlier in this brief. It involved a rehabilitation of an insolvent bank under a statute providing for "freezing of deposit agreements" under the direction of the Superintendent of Banks, supervised by the Court of Chancery.

X.

It Is Too Late for Petitioners to Urge, as They Do in Their Supplemental Brief, That Section 1011 of the Insurance Code Is Unconstitutional. In Any Event Their Contentions in That Regard Are Without Merit.

Under Point II of their supplemental brief (pp. 7-9) petitioners contend for the first time that since, as they say, it is mandatory upon the Superior Court to appoint the Commissioner conservator and vest title to the insurance company's assets in him upon his filing the application, that section is unconstitutional, violates the due process clause and impairs the contracts of the policyholders, and is an unconstitutional delegation of legislative power to an administrative officer. They also assert (Supp. Br., Point III, pp. 10-16) that Section 1011 is unconstitutional because, as they say, it authorizes the Insurance Commissioner to make findings without notice or hearing on the question whether the insurance company is in a hazardous condition or is insolvent and, further, that in the case at bar that the Commissioner took no evidence but, nevertheless, made the finding in violation of the rules laid down in the Kansas City stock yard cases (*Morgan v. United States* (first appeal), 298 U. S. 468; second appeal, 58 S. Ct. 773; on rehearing, 58 S. Ct. 999).

The contention that Section 1011 of the Insurance Code is unconstitutional should not be considered by this court for the following reasons: (1) The contentions above stated were not raised before the state Supreme Court; on the contrary, petitioner Neblett, in the oral argument before the state Supreme Court, conceded for himself, at least, that the provisions of the Insurance Code are valid and constitutional [R. 1532]. (2) The point was not

suggested in the petition for *certiorari*. (3) It was not mentioned in petitioners' specifications of error (Pet. p. 28). (4) It was not argued in their brief in support of the petition for *certiorari*.

Under such circumstances the point should not be considered by this court.

Clark v. Willard, 294 U. S. 211, at 216, and cases cited.

Petitioners' contentions, however, on the merits are not well taken.

Under Section 1011 of the Insurance Code the Superior Court shall appoint the Commissioner conservator and vest title to the assets of the insurance company in him as such conservator (*inter. alia*) (a) when as a result of an examination he has found the insurance company's business to be in a hazardous condition, or (b) when his last report of examination shows said company to be insolvent. The Superior Court does not, as contended by petitioners, act merely in a ministerial capacity (Supp. Br, p. 12). If that were so, how could Judge Edmonds have been disqualified to make the order appointing the Commissioner conservator? The Superior Court sits as a judicial body and determines in fact whether the Commissioner has made a *prima facie* case under Section 1011 of the Insurance Code. If the Superior Court determines that a *prima facie* case has been shown, the order appointing conservator and vesting assets is made because it is a proper case under Section 1011 for such an order to be made.

Section 1011 of the Insurance Code must be read in connection with the next succeeding section. Section 1012 of said code provides that the order appointing

conservator shall continue in force and effect until, on the application of the Commissioner or of the insurance company, it shall

> "after a full hearing, appear to said court that the ground for said order directing the Commissioner to take title and possession does not exist or has been removed and that said person [insurance company] can properly resume title and the possession of its property and the conduct of its business."

Under these two sections (a) the court is authorized, upon a proper showing by the Commissioner, to appoint a conservator and, *for this purpose only,* the allegations in the Commissioner's application are given conclusive effect, (b) neither the order appointing the conservator nor the allegations contained in the Commissioner's said application are conclusive on the insurance company, for the latter may immediately move for a full hearing under Section 1012, where the court hears evidence and may dissolve the conservatorship.

The legislature deemed it advisable that when any of the conditions mentioned in Section 1011 of the Insurance Code were made to appear by the verified application of the Commissioner, an order appointing conservator should be made, reserving, however, to the insurance company full rights to have the order dissolved. This is nothing more than the common case of an appointment of a temporary receiver *ex parte* with the right to the defendant to move for a dissolution of the receivership.

This discussion is more or less academic in this case, for the Old Company appeared and consented to the appointment of the Commissioner as conservator [R. 33].

It is not a legislative function for the Commissioner "to take evidence *ex parte* and to find facts upon which

the court must forfeit the title of an insurer to its properties * * *" (Supp. Br. p. 9), as petitioners erroneously suppose. Nor does the Commissioner act in a judicial or *quasi-judicial* capacity. He acts purely as an administrative officer. Through his deputies he makes an examination of the insurance company, much as the Comptroller of the Currency examines national banks through his bank examiners.[19]

The Kansas City stock yard cases (*Morgan v. United States, supra*) present an entirely different situation. There the Secretary of Agriculture acted in a *quasi-judicial* capacity in fixing rates and the statute provided for a "full hearing" at which evidence should be taken (298 U. S. 473). The Secretary's determination of the facts was made conclusive (298 U. S. 477). The decisions of this court were grounded upon the fact that no "full hearing" had been accorded to the petitioners therein.

In the case at bar petitioners assume that someone (who, they do not state) should have been given notice of the Commissioner's examination and an opportunity to be heard, and they insist that, for lack of such notice and hearing, constitutional rights have been violated [Supp. Br. p. 8]. The vice of this argument is (1) the assumption that the Commissioner's examination, upon which his application for appointment as conservator is predicated, is a *quasi-judicial* proceeding, and (2) that

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[19]In *Bushnell v. Leland*, 164 U. S. 684, it was held that the Comptroller of the Currency did not exercise judicial power in violation of the Federal Constitution, because under the National Bank Act he was empowered to appoint a receiver to a defaulting or insolvent national bank without a previous judicial ascertainment of the necessity for the appointment (164 U. S. 685).

they, as policyholders, are entitled to notice and an opportunity to be heard.

(1) As we have pointed out, the Commissioner, in making his examination, is acting purely in an administrative capacity, collecting facts and making an examination which will enable him to make a *prima facie* case for his appointment as conservator.

(2) But, even if it be assumed that the examination was in the nature of a *quasi-judicial* proceeding, petitioners as general creditors were not entitled to notice or to participate in such hearing. They were represented by the Commissioner, their trustee (Ins. Code, Sec. 1057). The only person entitled to notice and an opportunity to be heard was the Old Company. It is absurd to suppose that the Commissioner's report and examination of the Old Company's books was made without the knowledge of the Old Company. In any event, the only person who could raise this constitutional objection was the Old Company (*Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 289), and it has not done so. Moreover, petitioners were given the opportunity to have the Old Company's insolvency and hazardous condition determined by the trial court. Petitioner Neblett embraced this opportunity [R. 248], as did other interested parties [R. 270-271]. The trial court decided the point against them [R. 1385-1386]. Where only property rights are concerned, mere postponement of judicial inquiry is not a denial of due process. (Compare *Phillips v. Commissioner*, 283 U. S. 589, 596-597.)

Even if the petitioners' contention that Section 1011 of the Insurance Code is unconstitutional could be raised at this late date, it is entirely devoid of merit.

XI.

Reply to Brief Filed by Respondent George I. Cochran.

After this brief had been set in type, respondents Day *et al.* were served with a copy of the brief of respondent George I. Cochran, in which he argues in support of petitioners' position, espousing particularly the cause of the non-can policyholders.

In order to keep the record clear we call the following facts to the court's attention: Mr. Cochran (others with him) filed a complaint in intervention [R. 233 *et seq.*] and responses respectively to the orders to show cause of July 23, August 13 and August 14, 1936 [R. 716 *et seq.*, 791 *et seq.* and 797 *et seq.*, respectively]. While certain of these pleadings invoked the Federal Constitution, none was filed in reference to the Commissioner's approved plan submitted September 25, 1936 [R. 904]. He took no appeal to the Supreme Court [R. 1525], nor did he or anyone in his behalf file a brief either in opposition to or in support of the order appealed from (10 Cal. (2d) 313). On July 22, 1936, he was Chairman of the Board of Directors of the Old Company, and prior to that time had been president. He was a stockholder and sued in that capacity in his first pleading [R. 233]. He was also a holder of a life policy [R. 717] but (so far as the record shows) *did not hold a non-can policy.*

So far as he files his said brief to protect his own interests as a life policyholder and stockholder (Cochran's Br. p. 2), it would seem that he is precluded by his failure to appeal and his failure to petition for writ of certiorari (compare *Alexander v. Cosden Co.*, 290 U. S. 484, at 487, and cases cited).

Under these circumstances we do not believe that Mr. Cochran should be permitted to file a brief. However, if we are incorrect in our view and the court considers said brief, we tender this as our answer to Mr. Cochran's two contentions (A and B).

A. Under his Point A, Mr. Cochran contends (1) that Section 1043 of the Insurance Code makes no provision for the "reorganization" of an insurance company (Cochran's Br. p. 7), and that (2) if the legislature has made such provision, then this amounts to an unlawful delegation of legislative power.

The difficulty with Mr. Cochran's first position is that the state Supreme Court expressly held that the Insurance Code

> "when read as a whole discloses a clear and unequivocal intent to preserve whenever possible the 'business' of the insolvent company, and if to preserve such business—if to rehabilitate such business—a new corporation must be organized, the power clearly exists." [R. 1537-1538.]

The construction of the Insurance Code was plainly within the exclusive authority of the California Supreme Court and the contention raised that the Insurance Code was incorrectly construed by the state Supreme Court does not present a federal question (see authorities cited under Point IV, *supra*). (2) The alternative contention urged, namely, that if the statute can be construed to authorize the Commissioner to propose a plan of "reorganization,"

it is an unconstitutional delegation of authority, does not present a federal question.

Dreyer v. Illinois, 187 U. S. 71, 83-84;

Crowell v. Benson, 285 U. S. 22, 57;

Highland Farms Dairy Inc. v. Agnew, 300 U. S. 608, 612-613.

B. Mr. Cochran's Point B, based on the "contract clause" of the Federal Constitution, is an enlargement of or an addition to petitioners' argument under their Point J (Pet. pp. 55-56) and a portion of their Point IV (Supp. Br. pp. 21-23). Our Points VI, VII, VIII and IX, *supra,* respond to petitioners' point that their contracts have been impaired. New suggestions made by Mr. Cochran will be briefly answered.

As we understand Mr. Cochran's argument (Cochran's Br. pp. 20-23), it is that on liquidation the dissenting non-can policyholders have a right to look to the entire assets of the Old Company for the satisfaction of their claims, whereas under the plan they are limited to a special fund (said Br. p. 22). He contends (said Br. p. 20) that this special fund consists of (a) the non-can dissenters' share of the reserves behind the non-can policies, which reserves are set up only to the extent required after the reduction of benefits, and (b) further payments out of funds available for general corporate purposes, subject to what he declares "a very effectual limitation" (said Br. p. 20).

He then argues that the aggregate measure of damages on all non-can policies should equal the sum of $23,000,000, the amount by which the Commissioner found the non-can reserves to be inadequate. Consequently, he says, the

non-can policyholders have not been offered an alternative as claimed by the state Supreme Court.

The vice in Mr. Cochran's argument is obvious. In a case of liquidation the non-can policyholder would not share in the "further payment" to be made to the Commissioner by the New Company out of its future profits *because in the event of liquidation there would be no future profits.* These "further payments," said by Mr. Cochran to be subject to "a very effectual limitation," are made out of funds not reasonably required for the reasonable, proper and profitable conduct of the operations of the New Company as a going concern [R. 1416]. It is no part of the plan that the New Company shall hazard its existence as a going concern in order to enlarge said "further payments." The preservation of the going concern value and other intangible assets was one of the main objectives attained (held the trial court [R. 1386]) by the approved plan.

Mr. Cochran also overlooks the fact that there are other assets in the hands of the Commissioner, to wit, the stock of the New Company and causes of action against the former officers, etc., of the Old Company and upon their fidelity bonds.

In respect to the deficit in the non-can reserves of $23,000,000, which Mr. Cochran asserts is the aggregate on non-can claims, he overlooks the fact that (a) the computation of the deficit in non-can reserves was made *before* the sum of $1,792,118.97 was transferred to health and accident (including non-can) reserves [R. 1410]; (b) the court made no adjudication of the amount by which the reserves were inadequate or the Old Company insolvent [R. 1000-1001 and 1385-1386] and that for aught that

appears from the record the evidence may have shown that the reserves were not as inadequate as first determined by the Commissioner; (c) the percentage of benefits on non-can policies unconditionally assumed by the New Company may have been conservatively estimated in order that the New Company would be certain not to become insolvent in respect to its unconditional partial assumption of consenting non-can policies.[20]

The aggregate measure of damages of all non-can policies suggested by Mr. Cochran to be $23,000,000 (Br. p. 23) is not only erroneous as a matter of fact in the respects above specified, but the question has not been passed on by the California courts or, we understand, by any other court.

In any event, the measure of damages is only one of the factors which determine the amount which policyholders would receive in the event of liquidation. Another and very important factor is the amount which the assets would bring on forced sale. In respect to this factor the record is silent, except that we know that the assets of the Old Company would be of substantially less value if they were sold separately or in separate units or parcels than if sold as a going concern [R. 1386, 1389].

Mr. Cochran also argues (said Br. p. 21) that there is a discrimination between *dissenting* life policyholders and

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[20]This is a reasonable assumption and, if true, would not harm the non-can policyholders whether they dissent or consent, because the profits from the non-can policies inure ratably to their benefit.

dissenting holders of non-can policies, upon the ground that the share of the reserves payable to the Commissioner as liquidator is larger in the case of life policies than in the case of non-can policies. There is no basis for any such argument. There is nothing in the plan that provides that the Commissioner shall prefer the claims of dissenting life policyholders over those of dissenting non-can policyholders. All dissenters share ratably in the reserves transferred to the Commissioner without regard to the source of such reserves.

Concluding his argument, Mr. Cochran says (contrary to the holding of the state Supreme Court) that "non-can policyholders have not been offered an alternative * * *. They really were offered no alternative at all" (said Br. p. 23). Against this opinion of Mr. Cochran, *who is not a non-can policyholder and therefore never faced the necessity of making the selection of an alternative,* we oppose the practical consideration that of the many thousands of non-can policyholders who actually were faced with the alternative and who had to determine as a *personal, practical and dollars-and-cents matter* whether the plan offered a real alternative, only three non-can policyholders, Messrs. Bettin, Dickinson and MacDonald, appealed from the order of December 4, 1936, or petitioned this court for certiorari. Against Mr. Cochran's opinion we likewise oppose the decision of the state Supreme Court on that very point [R. 1539] and the adjudication of the trial court [R. 1385-1387] which for more than six weeks heard the evidence in this case; none of which is before this court.

We submit that Mr. Cochran has failed to make out a case for reversal.

CONCLUSION.

Many of the points urged by petitioners are founded upon a misconception of the record. Their contention that their contract rights have been impaired and that they have been denied due process is found on analysis to be untenable. We trust we have demonstrated to the satisfaction of this court that the approved plan was the only feasible plan which would preserve great benefits to all of the policyholders and make possible full restoration of rights; that the different treatment given certain policyholders was necessary by the very nature of the circumstances; that the plan was equitably and fairly conceived and that it was authorized by the principles found in decisions of this and other jurisdictions.

We are of the belief that, in a final analysis, the Commissioner had but two options: liquidation (immediate or deferred) or a plan embodying the principles of the approved plan. As a trustee he refused to follow the easier path, but, instead, meticulously worked out a plan which the Superior Court, after hearing the evidence, declared was fair and equitable and did not unjustly discriminate between any classes of policyholders. The Superior Court approved the plan after a trial lasting six weeks, during which oral and documentary evidence was introduced [R. 1383], no part of which evidence was brought to the California Supreme Court or to this court.

We respectfully submit that no constitutional rights of the petitioners have been violated and that the order of the Superior Court and the judgment of the Supreme Court of California were correct and should be affirmed.

Respectfully submitted,

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JOHN N. CRAMER,
Counsel for Respondents Carroll C. Day, Harry C. Fabling, Joseph M. Gantz, Jack Paschall and Ralph J. Wetzel.



APPENDIX.

CODE OF CIVIL PROCEDURE, Section 416:

Sec. 416. From the time of the service of the summons and of a copy of the complaint in a civil action, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. In all cases where a corporation has forfeited its charter or right to do business in this State, the persons who become the trustees of the corporation and of its stockholders or members may be sued in the corporate name of such corporation in like manner as if no forfeiture had occurred and from the time of service of the summons and of a copy of the complaint in a civil action, upon one of said trustees, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of all said trustees, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him.

CIVIL CODE OF CALIFORNIA, Sections 2252, 3537:

Sec. 2252. When a trustee is appointed by a court or public officer, as such, such court or officer is the trustor, within the meaning of the last section.

Sec. 3537. Superfluity does not vitiate.

CALIFORNIA INSURANCE CODE (1935), Sections 1011, 1012, 1013, 1015, 1019, 1043 and 1057:

Sec. 1011. Upon the filing, by the commissioner, with the superior court in the county in which is located the principal office of such person in this State, of a verified application showing any of the following conditions to exist:

(a) That such person has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the commissioner or his deputy or examiner.

(b) That such person has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer.

(c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person.

(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or creditors, or to the public.

(e) That such person has violated its charter or any law of the State.

(f) That a certificate of authority of such person has been revoked under section 10711.

(g) That any officer of such person refuses to be examined under oath, touching its affairs.

(h) That any officer or attorney-in-fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person.

(i) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked;

Or, upon the filing, by the commissioner, of a verified application accompanied by a certified copy of the commissioner's last report of examination of any person to whom the provisions of this article apply showing such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this code, said court shall issue its order vesting title to all of the assets of said person, wheresoever situated, in the commissioner or his successors in office, in his official capacity as such, and directing the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem apropriate, and enjoining said person and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until a further order of said court.

Sec. 1012. Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business.

Sec. 1013. Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately, the commissioner, without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court. Any person having possession of and refusing to deliver any of the books, records or assets of a person against whom a seizure order has been issued by the commissioner, shall be guilty of a misdemeanor and punishable by fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both such fine and imprisonment.

Sec. 1015. Immediately after such seizure, the commissioner shall institute a proceeding as provided for in section 1011 and thereafter shall proceed in accordance with the provisions of this article.

Sec. 1016. If at any time after the issuance of an order under section 1011 it shall appear to the commissioner that further efforts to proceed under said section would be futile, he may apply to the court for an order to liquidate

and wind up the business of said person. Upon a full hearing of such application, the court may make an order directing the winding up and liquidation of the business of such person by the commissioner, as liquidator. The title to all property and assets of such person, vested in the commissioner under section 1011, shall remain in the commissioner, as liquidator, for the purpose of carrying out the order to liquidate and wind up the business of such person.

Sec. 1019. Upon the issuance of an order of liquidation under section 1016, the rights and liabilities of any such person and of creditors, policyholders, shareholders and members, and all other persons interested in its assets shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order in the office of the clerk of the county wherein the application was made.

Sec. 1043. In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, or enter into *rehabilitation agreements.* Such rehabilitation or reinsurance agreements shall provide that, subsequent to the date thereof and for such period of time as the commissioner may determine, no investment or reinvestment of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the commissioner. * * *

Sec. 1057. In all proceedings under this article, the commissioner shall be deemed to be a trustee for the benefit of all creditors and other persons interested in the estate of the person against whom the proceedings are pending.



OCT 17 1938
CHARLES ELMORE CROPL
CLERK

Supreme Court of the United States

October Term, 1938. No. 21.

WILLIAM H. NEBLETT, Et Al., - - - *Petitioners,*

versus

SAMUEL L. CARPENTER, JR., Insurance Commissioner of the State of California.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE INSURANCE COMMISSIONER OF CALIFORNIA.

1. California did not violate the "contract" clause, when—in rehabilitating the business of an insolvent insurance company—she devoted *all* assets exclusively to the payment of *all* creditors; even though she gave one class of policies a different treatment from all other policies.

That difference was absolutely necessary (1) to preserve the "going concern" business so as to continue 100% insurance protection to 250,000 policyholders who needed it, (2) to save millions of dollars of assets which would otherwise have been lost, and (3) to avoid a forced-sale liquidation with the inevitable delay, expense and losses—all with the result that the alleged 50,000 subordinated policies will now (a) receive more than on liquidation and (b) probably receive, in turn, 100% re-insurance.

2. Petitioners elected not to bring up any of the evidence on the seven weeks' hearing. In its absence, it must be presumed that such evidence (if here) would support the judgment and show (1) that there was no ultimate or substantial difference in treatment and (2) that the reduction in benefits [limited to "Non-Can" Active Lives] was temporary and beneficial to those affected.

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INDEX

	PAGE
Question Involved	1
California's Law for Rehabilitation of Insolvent Insurance Companies	2
Relevant Statutes	5
Statement of Facts	5
I. Pacific Mutual's business (1868-1936)	5
A. Life Insurance	5
B. Accident and Health Insurance	6
II. Insurance Departments of Six States' report of Pacific Mutual's insolvency	6
III. California's protection of policyholders by Rehabilitation	7
1. Statutory findings of fact	7
2. Petition to State Court for Rehabilitation	7
3. Organization of New Company; execution of Rehabilitation Agreement	8
4. Void Court Orders	9
5. New Company began functioning	9
IV. Objections to Rehabilitation; Disqualification of EDMONDS, J	9
V. Commissioner reappointed Conservator; his actions ratified	10
VI. Rehabilitation instead of Liquidation	10
VII. Revised Rehabilitation Agreement; objections thereto	12
VIII. Seven weeks' Judicial Hearing before a qualified Judge (WILLIS, J.)	13

PAGE

IX. Commissioner's Rehabilitation Plan..... 14

X. December 4th Order approving Rehabilitation Plan..... 20

XI. Appeal from December 4th Order..... 22

XII. Rehabilitation Plan Approved by Supreme Court of California..... 22

XIII. *Certiorari* granted..... 24

XIV. Procedural "due process" given..... 25

XV. Measure of Damages..... 26

1. *In the event of Liquidation*..... 26

(1) Life Policies..... 27
(2) "Non-Can" policies..... 27

A. *Pro rata* of last premium; or..... 28
B. All premiums paid [with interest]; or. 28
C. Reserve..... 29

2. *In the event of Rehabilitation*..... 29

Summary of Points Discussed..... 30

FIRST POINT: Mr. Neblett's right to object is limited to the effect of the Rehabilitation Plan on his Life policy; and he cannot question its validity as applied to "Non-Can" policies.

The Rehabilitation Plan (a) did not impair the obligation of Mr. Neblett's *Life* policy, and (b) did not deprive him of any property without due process of law. 31

I. Objections limited to *Life* policies..... 31

II. "Due process" claim..... 32

III. "Impairment of contract" claim..... 35

(1) Options offered..... 35
(2) No "impairment of contract"..... 39

PAGE

SECOND POINT: "Non-Can" policyholders who were Disabled Lives on July 22, 1936, were re-insured 100%; and they have never objected to the Rehabilitation Plan.

The Rehabilitation Plan did not impair the obligation of the policies of such "Non-Can" (Disabled Lives) 44

(1) No objectors among Disabled Lives . . . 44

(2) Disabled Lives re-insured 100% 45

(3) No "impairment of contract" obligation 46

THIRD POINT: The Rehabilitation Plan did not (1) impair the obligation of "Non-Can" Policies on Active Lives, nor (2) deprive the holders thereof of their property without due process of law 46

Messrs. Bettin, et al., have no just cause for complaint.

1. **Active Lives—Options offered** 47
2. **State's administration of its own *insolvent* corporations** 49
3. **Mr. Bettin's theory of "contract" clause** 51
4. **Response thereto** 52

(1) No Federal right to *compel* Liquidation . . 52

(2) State decided *against* Liquidation 53

(3) No evidence as to any better Plan 57

(4) Rehabilitation essential 58

(5) JUSTIFICATION FOR DIFFERENCE IN TREATMENT OF "NON-CAN" ACTIVE LIVES FROM ALL OTHER POLICIES 60

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PAGE

A. "Horizontal" reduction in liabilities *ruinous* 60

B. "Vertical" reduction in liabilities *necessary* 63

5. Intrinsic fairness of Rehabilitation Plan 65

Stockholders get nothing; all assets go to creditors 65

(*a*) Speed essential to prevent great losses . . . 66

(*b*) Life and Commercial Health and Accident Policies *over-paid* for their protection; "Non-Can" policies *under-paid* for their protection 66

(*c*) "Non-Can" *Disabled* Lives 100% reinsured to preserve good will 66

(*d*) "Non-Can" underpaid 67

(*e*) Reinsurance was graded in proportion to adequacy of premiums 67

(*f*) Assets allocated for benefit of "Non-Can" *Active* Lives 67

(*g*) Plan realized *more* out of assets than could be realized by Liquidation 68

(*h*) Essential reason for difference in treatment between Life policies and "Non-Can" Active Lives 69

(*i*) No discrimination against dissenters 70

(*j*) Life policies' priorities necessary to preserve business and to realize on assets . . . 70

(*k*) Liquidator provided for, with whom claims could be filed 73

FEDERAL QUESTION INVOLVED 75

(1) Does "contract" clause prevent constructive Rehabilitation of insolvent corporation directly affecting, not only the immediate parties, but the public and the general welfare of the community 75

(2) Size and extent of Life Insurance, which is affected with the public interest 76

PAGE

(3) Reserved power of the State (*i. e.*, police power) impliedly written into every insurance policy... 77
(4) Depression (1929-1938) and Legislative relief from its effects 78
(5) Rehabilitations in Banking, Insurance, Building and Loan fields 80
(6) Nature of Pacific Mutual's Rehabilitation..... 80

REVIEW OF RECENT AUTHORITIES UPHOLDING SIMILAR REHABILITATION PLANS 81

Doty v. *Love*, 295 U. S. 64..... 82
Van Schaick v. *National Surety Co.*, 239 App. Div. 490, affirmed 264 N. Y. 473..... 86
Van Schaick v. *Title & Mortgage Guarantee Co.*, 264 N. Y. 69..... 87
Thrower v. *Kistler*, 14 F. Supp. 217..... 89
National Surety Co. v. *Nantz*, 262 Ky. 413..... 90
Milner v. *Gibson*, 249 Ky. 594..... 90
Shepherd v. *Mt. Vernon Trust Co.*, 269 N. Y. 234 91
State v. *Title Guarantee & T. Co.*, 168 Md. 376.. 91
Priest v. *Whitney Loan & T. Co.*, 219 Iowa, 1281 92

APPENDIX—

Relevant Statutes 95

LIST OF AUTHORITIES.

PAGE

Adair v. *Bank of America*, 303 U. S. 350.....3, 4, 79
Aetna Insurance Co. v. *Hyde*, 275 U. S. 440..... 40
Aluminum Co. v. *Ramsey*, 222 U. S. 251..... 32
Amer. Cas. Ins. Company's case, 82 Md. 535.....26, 28
American Ins. Union v. *Woodard*, 118 Okla. 243.....27, 29
American Surety Co. v. *Baldwin*, 287 U. S. 156..... 25
Anglo-California Trust v. *Oakland Rys.*, 193 Cal. 451.41, 72
Antonelle v. *City Hall Comrs.*, 92 Cal. 228..... 72
Appleby v. *Delaney*, 271 U. S. 403.....24, 32
Application of People by Van Schaick, 239 App. Div. 490..... 2
Arizona Employers' Liability cases, 250 U. S. 400.... 32
Arkadelphia Co. v. *St. Louis S. W. Ry.*, 249 U. S. 134. 31
Asheville Cigar Co. v. *Brown*, 100 Ga. 171..... 71
Ashton v. *Cameron Co. Dist.*, 280 U. S. 513.....20, 79, 81
Assaria State Bank v. *Dolley*, 219 U. S. 121..... 31

Bank of Murray v. *Farmers' Bank*, 257 Ky. 251..... 80
Becker v. *Amos*, 100 Fla. 231..... 80
Bell v. *Lamborn*, 2 F. (2d) 205..... 26
Bernheimer v. *Converse*, 206 U. S. 516..... 38
Block v. *Hirsch*, 256 U. S. 135..... 76
Bond & Mtge. Guarantee Co., In re, 157 Misc. 240.... 3
Breeze v. *Brooks*, 97 Cal. 72..... 41
Bushnell v. *Leland*, 164 U. S. 684..... 34

Carbon Fuel Co. v. *Chicago, etc., R.*, 202 Fed. 172.... 72
Carmichael v. *Southern Coal Co.*, 201 U. S. 495..... 32
Carpenter v. *Pacific Mut.*, 10 Cal. (2d) 307:.....2, 23, 72
Carr v. *Hamilton*, 129 U. S. 252.....26, 27, 29
Casey v. *Galli*, 94 U. S. 673..... 34

PAGE

Casualty Co. of Amer., In re, 244 N. Y. 443..... 3
C. B. & Q. R. v. *Chicago*, 166 U. S. 226..... 32
Christensen v. *Merchants & M. Bank*, 168 Miss. 43....56, 80
City Bank Co. v. *Irving Trust Co.*, 299 U. S. 433..... 79
Clark v. *Williard*, 292 U. S. 112..... 3, 50
Columbus & Greenv. Ry. v. *Miller*, 283 U. S. 96..... 32
Commonwealth v. *Amer. Life Ins. Co.*, 162 Pa. St. 586. 26
Concordia Fire Ins. Co. v. *Illinois*, 292 U. S. 535..... 40
Continental Bank v. *Rock Island Ry.*, 294 U. S. 648.. 79
Coombes v. *Getz*, 285 U. S. 448.....16, 25
Corstvet v. *Bank of Deerfield*, 220 Wis. 209..... 80
Cralle v. *Louisville Title Co.*, 244 Ky. 753..... 80
Cross v. *Georgia Iron & Coal Co.*, 250 F. 438..... 41

Cummings v. *Howard*, 63 Cal. 503..... 72
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282..... 32
Davidson v. *New Orleans*, 96 U. S. 97..... 25
Dickinson v. *Saunders*, 129 Fed. 16.....49, 56
Dohany v. *Rogers*, 281 U. S. 362..... 25
Donashoe's Inc., Re, 19 F. Supp. 441..... 71
Dorman v. *Dell*, 245 Ky. 34..... 80
Dorman v. *Jones*, 257 Ky. 4..... 80
Doty v. *Love*, 295 U. S. 64.3, 24, 25, 40, 52, 56, 69, 79, 80, 81, 82
Dunn v. *Love*, 172 Miss. 342.....40, 49, 52, 56, 57, 69, 77, 80

Ebert v. *Mutual Reserve Fund*, 81 Minn. 116..... 29
Eskew v. *Buckhannon Bank*, 115 W. Va. 579.....53, 80

Forrest v. *Jack*, 294 U. S. 158, note..... 34
Fort Smith Light Co. v. *Paving Dis.*, 274 U. S. 387... 40

Garland v. *Jefferson Standard Life*, 179 N. C. 67....27, 29
General Finance Co. v. *U. S.*, 45 F. (2d) 380..... 41
Georgia Power Co. v. *Decatur*, 281 U. S. 505..... 32
German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389... 4, 76
Gibbes v. *Zimmerman*, 290 U. S. 326.....32, 39, 52
Grand Trunk W. R. Co. v. *Railroad Co.*, 221 U. S. 400 32
Gray v. *Gray*, 185 Cal. 598..... 72
Gregg v. *Metropolitan Trust Co.*, 197 U. S. 183..... 72

PAGE

Hagar v. *Reclamation District*, 111 U. S. 701..... 32
Hagen v. *First State Bank*, 180 Minn. 113..... 80
Hampton v. *St. L. Iron Mt. & S. Ry.*, 227 U. S. 456.... 32
Hartford Acc. Co. v. *Nelson Co.*, 291 U. S. 352..... 76
Hatch v. *Reardon*, 204 U. S. 152..... 32
Hendrikson v. *Apperson*, 245 U. S. 105..... 32
Hessen Siak Shams v. *Nebraska Bk.*, 48 F. (2d) 894.. 81
Hodge Co. v. *Cincinnati*, 284 U. S. 335..... 40
Hoff v. *First State Bank*, 174 Minn. 36..... 80
Holyoke Power Co. v. *Paper Co.*, 300 U. S. 324.....78, 79
Home Bldg. & Loan Assn. v. *Blaisdell*, 290 U. S. 398 .....3, 32, 50, 53, 77, 78, 79, 81, 88
Hopkins Savings Assn. v. *Cleary*, 296 U. S. 315..... 75
Hutchins v. *Pacific Mutual Life*, 20 F. Supp. 150..... 74

Indiana v. *Brand*, 303 U. S. 95..... 80

Jacoby v. *Bond & Mtge. Guarantee Co.*, 72 F. (2d) 420 3
Jennings v. *Fidelity & C. Trust Co.*, 240 Ky. 24..... 80
Johnson v. *Button*, 120 Va. 339.....26, 28

Kansas City Ry. Co. v. *Cent. Union Tr.*, 271 U. S. 445 71
Kelling Collection Agency v. *McKeever*, 209 Cal. 625.41, 72
Kennedy v. *Gibson*, 8 Wall. 498..... 34
Kipp v. *Fidelity Title & Mor'ge Co.*, 116 N. J. Eq. 409 28
Kuehner v. *Irving Trust Co.*, 299 U. S. 445..... 79

Levy Leasing Co. v. *Seigel*, 258 U. S. 242.....76, 77
Life & Cas. Ins. Co. v. *City of Florala*, 63 F. (2d) 195 41
Life & Casualty Co. v. *McCray*, 291 U. S. 566..... 76
Liggett Co. v. *Lee*, 288 U. S. 517..... 76
Loftus v. *Dept. of Agriculture*, 211 Iowa, 566..... 40
Louisville Bank v. *Radford*, 295 U. S. 555..... 4, 79
Lovell v. *St. Louis Mut. Life Ins. Co.*, 111 U. S. 264.....26, 27, 29
Loyal Friends of Amer. Assn. v. *Center*, 49 S. W. (2d) 898 28

PAGE

Malmstedt v. *Stillwell*, 110 Cal. App. 393..... 41
Manigault v. *Springs*, 199 U. S. 473.....50, 77, 79
Marcus Brown Co. v. *Feldman*, 256 U. S. 170..... 77
Massachusetts v. *Mellon*, 262 U. S. 447..... 32
McAulay v. *Truckee Ice Co.*, 79 Cal. 50..... 72
McConnell v. *McChord*, 172 Ark. 21..... 41
McConville v. *Ft. Pierce Bank*, 101 Fla. 727.....53, 76, 80
McSweeney v. *Equitable Trust*, 16 N. J. Misc. 193....24, 50, 53, 56, 77, 79, 80
Mechanics Trust Co., In re, 119 N. J. Eq. 141, 24, 28, 53, 77, 80
Midland Co. v. *K. C. Power Co.*, 300 U. S. 109..... 34
Milner v. *Gibson*, 249 Ky. 594..24, 40, 50, 53, 77, 79, 80, 81, 90
Miltenberger v. *Logansport Ry. Co.*, 106 U. S. 286.... 72
Moore v. *Donahoe*, 217 Fed. 177..... 71
Moore Ice Cream Co. v. *Rose*, 289 U. S. 373..... 25
Morrison v. *Regus*, 22 F. (2d) 804..... 41
Mutual Reserve Fund v. *Farrenbach*, 144 Fed. 342...28, 29

Nagel v. *Ghingher*, 166 Md. 231.....24, 57, 80
Nassau Smelting Co. v. *Brightwood Bronze Co.*, 265 U. S. 269..... 66
National Surety Co., Re, 268 N. Y. S. 88, s. c. 264 N. Y. 473.....53, 80, 86
Nat'l Surety Co., in Re, 248 App. Div. 111, 272 N. Y. 613..... 87
Natl. Surety Corp. v. *Ellison*, 88 F. (2d) 399..... 3
Natl. Surety Corp. v. *Nantz*, 262 Ky. 413.....3, 80, 90
Neblett v. *Carpenter*, 304 U. S. ——..... 24
New York Life Ins. Co. v. *Statham*, 93 U. S. 24..... 62
New York Title & Mtge. Co., In re, 156 Misc. 186..... 2
Norman v. *B. & O. R. Co.*, 294 U. S. 240.....78, 79
North Amer. Bldg. Assn. v. *Richardson*, 6 Cal. (2d) 90. 35
North Jersey Title Ins. Co., 120 N. J. Eq. 148.....77, 80
North Laramie Land Co. v. *Hoffman*, 268 U. S. 276...25, 34
North River Ins. Co. v. *Walker*, 65 F. (2d) 116.....26, 28
Nortz v. *U. S.*, 294 U. S. 317.....78, 79

O'Connor v. *Watson*, 81 F. (2d) 833..... 34

PAGE

Ofield v. *Nat'l Ben. Life Ins. Co.*, 293 S. W. 271 27
O'Gorman & Young v. *Hartford Ins. Co.*, 282 U. S. 351 .40, 76

Pacific Inv. Co. v. *Ross*, 131 Cal. 8 72
Pacific States Co. v. *White*, 296 U. S. 176 40
Paul v. *Farmers' & M. State Bank*, 187 Minn. 411 80
Pavillion Ice Rink v. *O'Brien*, 60 Cal. App. 185 72
Penn Oil Co. v. *Minnesota*, 248 U. S. 158 40
Pennsylvania v. *Williams*, 294 U. S. 176 3
People v. *Commercial Alliance Life*, 154 N. Y. 95 26
Perry v. *U. S.*, 294 U. S. 330 .....78, 79
Phillips v. *Pantages Theatre*, 163 Wash. 303 28
Prehm v. *Kindig*, —— Ia. ——, 232 N. W. 812 41
Priest v. *Whitney L. & T. Co.*, 219 Iowa, 1281, ..53, 77, 80, 92

Quong Ham Wah Co. v. *Industrial Comm.*, 255 U. S. 445 34

Randolph Grocery Co. v. *Lamborn*, 3 F. (2d) 139 26
Red River Valley Bank v. *Craig*, 181 U. S. 548 31
Rhine v. *New York Life*, 248 App. Div. 120, 273 N. Y. 1 61
Richmond Corp. v. *Wachovia Bank*, 300 U. S. 124 79
Rindge v. *Los Angeles*, 262 U. S. 700 32
Rosenblatt v. *Johnson*, 104 U. S. 462 34

Savings Investment & T. Co. v. *Associated B. Co.*, 122 N. J. Eq. 95 .....53, 77, 80
Shepherd v. *Mt. Vernon Trust Co.*, 269 N. Y. 234 ..24, 49, 53, 56, 77, 79, 80, 91
Shindelar v. *Hadacheck*, 88 Cal. App. 319 72
Smith v. *Cahoon*, 283 U. S. 553 32
Smith v. *Natl. Credit Assn.*, 65 Minn. 283 28
Smyth v. *U. S.*, 302 U. S. 329 78
Standard Oil Co. v. *Missouri*, 224 U. S. 270 .....25, 24
State v. *Farm & Home Savings Assn.*, 338 Mo. 313 ..50, 53, 80
State v. *Minn. Title Ins. & T. Co.*, 104 Minn. 447 28
State v. *Newark Milk Co.*, 118 N. J. Eq. 504 .....50, 79
State v. *Price*, 129 Neb. 433 3
State v. *Title Guarantee & Trust Co.*, 168 Md. 376 .53, 80, 91

PAGE

State Savings Bank v. *Anderson*, 135 Cal. 437, affirmed 238 U. S. 611 35
St. Louis Trust Co. v. *Riley*, 70 Fed. 32 72
Sweeney v. *Jefferson Co. Bank's Reorg. Comm.*, 250 Ky. 187 80

Tennessee Valley Bank, Ex Parte, 231 Ala. 545 80
Thrower v. *Kistler*, 14 F. Supp. 217 ..... 3, 89
Timmer v. *Hardwick State Bank*, 194 Minn. 586 80
Timmons v. *Peoples Trust Co.*, 114 W. Va. 618 ..... 53, 80
Treigle v. *Acme Homestead Assn.*, 297 U. S. 189 75
Twining v. *New Jersey*, 211 U. S. 78 25

Union Dry Goods Co. v. *Ga. P. S. Corp.*, 248 U. S. 372 ..... 50, 79
Union Guarantee & Mtge. Co. v. *Van Schaick*, 75 F. (2d) 984 3
Usher v. *Sarco Co.*, 100 N. J. Eq. 428 28
U. S. Mortgage Co. v. *Matthews*, 293 U. S. 232 79
U. S. v. *Bekins*, 304 U. S. 27 79
U. S. v. *Knox*, 102 U. S. 422 34

Van Schaick v. *Title & Mortgage Guarantee Co.*, 264 N. Y. 69 ..... 2, 24, 49, 53, 56, 77, 79, 80, 86, 87
Vicars v. *Mut. Ben. Health & Acci. Assn.*, 259 Ky. 13 28

Wiggins v. *Burkham*, 10 Wall. 129 41
Willett v. *Schmeiser Mfg. Co.*, 82 Cal. App. 249 41
Wilson v. *Trent*, 238 Ky. 551 41
Wittnebel v. *Loughman*, 80 F. (2d) 222 35
Worthen Co. v. *Kavanaugh*, 295 U. S. 56 79
Worthen Co. (*W. B.*) v. *Thomas*, 292 U. S. 426 79
Wright v. *Union Central Life*, 304 U. S. —— 4, 79
Wright v. *Vinton Branch*, 300 U. S. 440 ..... 3, 4, 79

Zavelo v. *Reeves*, 227 U. S. 625 71

American Life Convention Special Bulletin No. 262 and Supplement thereto, "Emergency Legislation in the Several States," March-June, 1933 ... 78
2 Beale's Conflict of Laws §413.1 26
2 Cal. Juris. 867 72

PAGE

Conflict of Laws Restatement §413 26
5 Cooley's Briefs on Insurance (2d Ed.), p. 4676.... 26
1 Couch on Insurance §§244-247 ..... 58, 76
8 Couch on Insurance §2043 ..... 26, 27, 29
Fletcher—Cyclopedia Corporations, Vol. 7, §4840... 49
Gephart's Principles of Insurance, pp. 233-255 ..... 58, 76
Glenn on Liquidation §25, 265 ..... 3, 8
Mason's "Some Legal Phases of Bank Reorganizations," p. 57 20
Nash's "Measure of Damages Upon Breach of a Life Insurance Contract" 27, 28
Shanks' "The Law of Railroad Reorganization as Affecting Institutional Investors" (1935), p. 328. 20
Smith's "Notes on Life Ins." 58
Swaine's "Some Legal Phases of Corporate Financing, Etc.," pp. 135, 154-155 71
Vance "Inter-State Aspects of the Liquidation of Insolvent Insurance Corporations" 50
2 Willoughby on the Constitution [2d Ed.] §§748, 762, 781 ..... 35, 39, 50, 52, 80

ANNOTATIONS:

36 A. L. R. 1512 76
48 A. L. R. 110-116 ..... 28, 29
72 A. L. R. 1173 76
80 A. L. R. 1487 53
92 A. L. R. 1337 ..... 20, 53
96 A. L. R 1445 ..... 20, 53
99 A. L. R. 1217 53
104 A. L. R. 1203 53
107 A. L. R. 1235-7, *et seq.* 28, 29
9 C. J. S. Banks and Banking §§746-750 35
32 C. J., pp. 981, *et seq.*, 1039-1040 ..... 26, 27, 29, 76
27 Col. L. Rev. 901 71
38 Harvard Law Rev. 6 40
46 Harvard Law Rev. 1061 78
47 Harvard Law Rev. 660 78
48 Harvard Law Rev. 1414 ..... 20, 78

PAGE

50 Harvard Law Rev. 946 ..... 20, 78
51 Harvard Law Rev. 1292 78
29 Illinois Law Rev. 559 ..... 4, 66
19 L. R. A., N. S. 639, note 28
35 Michigan Law Rev. 1003, note 13 78
14 R. C. L., p. 857, §25 76

STATUTES.

CALIFORNIA Const., Art. 11, §13 ..... 23, 58

Civil Code, §3358 28
Insurance Code [1935], Ch. 145, Part 2, Ch. 1, Art. 14, §§1010-1061 5
§§1011-1027 ..... 7, 8, 11, 26, 36, 38, 49
§1043 ..... 2, 5, 11, 32
§10111 28

New York Ins. Law §400 2

Act June 30, 1876 [19 Stat. 63], U. S. C. A., Title 12, §191 34

Act June 25, 1910, 36 Stat. 839, U. S. C. A. Title II, §§22, 207 3

Bankruptcy Act, §§75, 77, 77B 78

Bank Conservation Act, March 9, 1933 [48 Stat. 2], U. S. C. A., Title 12, §§203, 207 34

Bank Holiday, March 6, 1933 (48 Stat. 1689-1691) 78

Gold Hoarding Act and Bank Conservation Act, March 9, 1933 (48 Stat. 1) 78

Gold Devaluation, May 12, 1933 (48 Stat. 52) 78

Gold Clause Repeal, June 5, 1933 (48 Stat. 112) 78

Gold Reserve Act of 1934 (48 Stat. 337) 78

Gold Devaluation Proclamation, Jan. 31, 1934 (48 Stat. 1730-1) 78

[References Required by Rules 12 and 27.]

OPINION BELOW: *Carpenter* v. *Pacific Mut. Life Ins. Co.*, 10 Cal. (2d) 307; R. 1509-1544.

JURISDICTIONAL AUTHORITY: Judicial Code §237(b), as amended by Act of February 13, 1925 (Ch. 229, 43 Stat. 936).

STATUTES INVOLVED: California Ins. Code (1935), Ch. 145, Part 2, Ch. 1, Art. 14 §§1010-1061; United States Constitution, Art. I, Sec. 10; 14th Amendment, Sec. 1.

DATE OF JUDGMENT, ETC.: Dec. 4, 1936 (R. 1378-1395).

NATURE OF THE CASE, RULINGS, ETC.: On July 22, 1936, Pacific Mutual Life Insurance Co. was insolvent. The Insurance Commissioner of California summarily seized its assets and business, and proceeded to operate them (through the formation of a New Company) pending a statutory Rehabilitation—the seizure being confirmed, and the operation authorized by the Co rt.

On December 4, 1936, after seven weeks' continuous trial, the Court (WILLIS, J.) sustained the proposed Rehabilitation, and authorized the execution of, and full performance under, a certain *revised* "Rehabilitation and Reinsurance Agreement" [called "Rehabilitation Plan"] (R. 1396-1444).

On December 7, 1937, the Supreme Court of California *affirmed* that judgment; and held that there was no violation of (*a*) California's Constitution or laws, or (*b*) the Federal Constitution's "due process," "equal protection," or "contract" clauses (R. 1509).

On May 16, 1938, *certiorari* was granted (304 U. S. ; R. 1546).

IN THE

Supreme Court of the United States

October Term, 1938. No. 21.

WILLIAM H. NEBLETT, ET AL., - - - - - *Petitioners,*

v.

SAMUEL L. CARPENTER, JR., INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR THE INSURANCE COMMISSIONER OF CALIFORNIA.

The sole question involved is whether California had the power [consistently with the Federal Constitution] to rehabilitate a local *insolvent* insurance company's business, *first,* by organizing a New Company, and then, *second,* by executing with the New Company a certain "Rehabilitation and Reinsurance Agreement";* which Rehabilitation Plan treated *some* of the so-called "Non-Can" policies [*i. e.,* Non-Can policies on Active† Lives] *differently* from all the rest of the policies—all of which (1) was done pursuant to specific authority given by the California Insurance Code, and (2) has been sustained by the

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*For brevity, hereafter sometimes called "Rehabilitation Plan."

†For definition of "Active" and "Disabled" Lives, see p. 16, note, *infra.*

California Courts (*Carpenter* v. *Pacific Mutual Life Ins. Co.*, 10 Cal. (2d) 307; R. 1509—which, for brevity will be often cited as OPINION R. —).

The petitioners [four‡ dissatisfied policyholders of the insolvent Company] insist (1) that the Rehabilitation Plan [for preserving its profitable business as a "going concern" and gradually applying all its assets, *tangible and intangible*, to the discharge of its obligations] is discriminatory, denies "due process," and impairs their policy contracts; and (2) that its assets should be liquidated by a quick sale to the highest and best bidder; and the cash proceeds thereof applied to the *pro rata* payment of all its creditors, including future, unaccrued, and unliquidated policy obligations (R. 990, 1233, 1347-1349).

CALIFORNIA'S LAW FOR REHABILITATION OF INSOLVENT INSURANCE COMPANIES.

In 1935, California adopted an Insurance Code, with a special chapter on "Proceedings in cases of Insolvency and Delinquency" of insurance companies, the Rehabilitation sections of which were "copied substantially from similar provisions in the New York Insurance Law" (R. 1532; Cf. N. Y. Ins. Law Art. XI, §400 *et seq.*; Cal. Ins. Code §1010 *et seq.*, §1043). The constitutionality of that New York Law has been repeatedly sustained [or assumed to be valid] in many State and Federal decisions cited in the margin.*

‡Out of about 275,000 policyholders.

Van Schaick v. *Title & Mtge. Guarantee Co.*, 264 N. Y. 69; *Application of People by Van Schaick*, 239 App. Div. 490; affirmed 264 N. Y. 473; *In re New York Title & Mtge.*

Numerous States, California, New Jersey, New York, etc., have adopted statutes, reflecting the spirit of the *Blaisdell* case, 290 U. S. 398; *Doty* v. *Love,* 295 U. S. 64, and the new Frazier-Lemke Act,[1] to provide for the rehabilitation [sometimes called "reorganization"] of insolvent or financially distressed insurance companies, which are denied both the benefits of the Bankruptcy Act[2] and of an ordinary Federal equity receivership.[3]

The purpose of these State "rehabilitation" statutes was:

First: To prevent corporate assets from being torn to pieces at the suit of rival creditors, resulting in dismemberment with great waste and inequality; and to avoid the sacrifice of assets and their unequal distribution by writs of execution as between local and foreign policy holders (*Clark* v. *Williard,* 292 U. S. 112, 123, 127-129; s. c. 294 U. S. 211, 214-215).

Second: By progressive liberalization in the administration of insolvent insurance corporations [having vast numbers of policyholder-creditors] "to pre-

Co., 156 Misc. 186; *In re Bond & Mtge. Guarantee Co.,* 157 Misc. 240; *In re Casualty Co. of Amer.,* 244 N. Y. 443; *State* v. *Price,* 129 Neb. 433; *Natl. Surety Corp.* v. *Nantz,* 262 Ky. 413; *Thrower* v. *Kistler,* 14 F. Supp. 217; *Natl. Surety Corp.* v. *Ellison,* 88 F. (2d) 399 (C. C. A. 8th); *Jacoby* v. *Bond & Mtge. Guarantee Co.,* 72 F. (2d) 420 (C. C. A. 2d).

[1] *Wright* v. *Vinton,* 300 U. S. 440, 456, 470; *Adair* v. *Bank of American Assn.,* 303 U. S. 350.

[2] U. S. C. A. Title 11 §§22, 207; Act June 25, 1910, 36 Stat. 839; Glenn on Liquidation §265; *Union Guarantee & Mtge. Co.* v. *Van Schaick,* 75 F. (2d) 984.

[3] *Pennsylvania* v. *Williams,* 294 U. S. 176.

vent a sacrifice of the creditor's interest"; "to avert the evils of liquidation"; to provide "opportunities for the rehabilitation" and "the maintenance [of the business] as a going concern" through "the continuance of the operations" (*Louisville Bank* v. *Radford,* 295 U. S. 555, 597; *Adair* v. *Bank of America,* 303 U. S. 350; *Wright* v. *Vinton Branch,* 300 U. S. 440; *Wright* v. *Union Central Life,* 304 U. S.).

Third: To provide a comprehensive method (under judicial control after full notice and hearing) to ensure the best results for the policyholder-creditors *as a whole,* (i) **by enabling them to keep their insurance in force, instead of a compulsory lapse when they might have become uninsurable,** and (ii) by realizing, at full value, the tangible assets, and by utilizing the Company's agency force and good will, instead of accepting "forced sale" prices for tangible assets alone—even if in the course of such a rehabilitation of the business of the *insolvent company*—(iii) some minor readjustments become necessary in the strict legal rights of the policyholders-creditors—all on the theory that the insurance business [with its many millions of policyholders and beneficiaries as common creditors] is sufficiently affected with a public use (*German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389) to justify protective rehabilitation proceedings ("Life Insurance Reorganization," 29 Ill. L. Rev. 559, 575).

Relevant Statutes.

[Insurance Code of California (1935), Ch. 145; Part 2, Ch. 1, Art. 14, §§1010-1061. *Cf.* Stat. (1935), pp. 540-553.]

§1043. In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, **or enter into rehabilitation agreements.** Such rehabilitation or reinsurance agreements shall provide that, subsequent to the date thereof, and for such period of time as the commissioner may determine, no investment or reinvestment of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the commissioner.

[All the relevant statutes are in the Appendix, p. 95, *infra.*]

STATEMENT OF FACTS.

I. *Pacific Mutual's business (1868-1936).* On December 31, 1935, "The Pacific Mutual Life Insurance Company *of California,*" hereafter generally called "Old Company" (with $215,000,000 assets) was engaged in two kinds of insurance in over *forty* States, *i. e.*:

A. *Life Insurance.* It had 200,000 policyholders insured for $600,000,000 life insurance. The legal Reserve therefor was over $170,000,000. That part of the business was sound with a Surplus of over $5,000,000* (R. 5-6, 24, 30, 31, 846; OPINION R. 1518-9, 1528, 1534-5, 1540).

*Nearly $6,000,000 by July 22, 1936.

B. *Accident and Health Insurance.* In addition, it had outstanding about 75,000 policies of Accident and Health insurance, of which about 50,000 were non-cancellable "Disability" policies (referred to in this Record as "Non-Can" policies) *containing no life insurance and no loan or surrender values;* under which (in addition to certain "accident" benefits), if a policyholder became *disabled,* Pacific Mutual *agreed to pay a monthly income* to the disabled policy-holder—on account of which, in July 1936, there was (*a*) a $20,000,000 liability on account of already **Disabled** lives (R. 29, p. 16, *infra*), and, in addition (*b*) a further $25,000,000 liability to take care of the future disablement of then **Active** lives;—to meet which $45,000,000 liabilities, Pacific Mutual had only $20,000,000 Reserve (R. 29-30).*

This "Non-Can" business suffered large disability losses, getting worse every year, until the Company, as a whole, became insolvent (R. 3, 31, 40, 324, 847-8, 1385-6, 1535).

II. *Insurance Departments of Six States reported Pacific Mutual to be insolvent.* On July 21, 1936 (af-

*Pacific Mutual *became insolvent* solely on account of its *Accident* Department where the "Non-Can" *premiums* were *hopelessly inadequate* to provide for the Disability Benefits (R. 324, 847-8, 1535, 1540). This resulted on December 31, 1935, in the Accident Department piling up a $20,000,000 *present* liability for future payments to "Non-Can" policyholders *already* disabled, *i. e.*, Disabled Life Reserve; and a then *present* liability of $25,000,000 for future payments to "Non-Can" policyholders *not then disabled, i. e.,* Active Life Reserve—an aggregate amount of $45,000,000 which was far beyond the capacity of the Pacific Mutual (even as a whole) then to provide (R. 29-31)—Result: Insolvency.

ter 4 or 5 months' investigation) the Insurance Departments of six States made a joint Report that as of December 31, 1935, Pacific Mutual's *liabilities* were nearly *Eighteen Million Dollars* ($18,000,000) *more* than its *assets;* that the Accident and Health business (largely composed of "Non-Cans") showed a *deficit of over Twenty-three Million Dollars* ($23,000,000); and that

> "immediate action must be taken to protect policyholders" (R. 30-32).

III. *California's "immediate action to protect policyholders" by a statutory Rehabilitation of Pacific Mutual.* On July 22, 1936, Carpenter (as Insurance Commissioner) took the following statutory—and practically simultaneous—steps to protect the policyholders:

1. He made the statutory finding that Pacific Mutual is "insolvent" and "in such condition that its further transaction of business will be hazardous to its policyholders, its creditors, and to the public"; and he then took summary possession of all its assets and business—as Ins. Code §1013 specifically authorized him to do *without* the necessity of any court order (R. 35, 324, 997-1001; OPINION R. 1527-9, 1533).

2. He petitioned the State Court [Los Angeles] to appoint him statutory Conservator and Liquidator of Pacific Mutual, with power (*a*) to take over and operate all its assets and business, (*b*) to work out a Plan of Rehabilitation, and (*c*) to execute a proposed

Rehabilitation Agreement, copies of which previously prepared Plan and Agreement were filed therewith (R. 1-102). Jurisdiction attached and Pacific Mutual appeared and consented (Ins. Code, §§1011-1015; R. 33, 48).

3. He organized a new "Pacific Mutual Life Insurance Company" (hereafter called New Company), purchasing its entire $1,000,000 Capital Stock with $3,000,000 of Old Company's cash (thereby giving to New Company $1,000,000 Capital Stock and $2,000,000 Surplus).

He executed the Rehabilitation Agreement* with New Company (R. 152-182); and he transferred to New Company all of Old Company's assets, except the Capital Stock of New Company, and any claims arising on account of any wrongful acts of any of the officers, etc., of Old Company (R. 183-190, 193, 850, 1387, 1397).†

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*It was slightly amended and re-executed the next day, July 23 (R. 108-9; 142-3; 193-225). It is somewhat different from the *revised* Plan (finally approved on December 4, 1936, and executed) which is the subject of this *certiorari*.

†Pacific Mutual's financial difficulties had become more or less widely known in California and in other States, even prior to the publication of the Report (R. 4, 235); and as the March-July investigation progressed, the Insurance Commissioners of the six States became fully aware of the Company's insolvent condition (Glenn on Liquidation, §25, p. 48).

The California Insurance Commissioner had been conferring for some days with his official legal adviser, the Attorney General of California, and also with some of the Company's officers (not believed to be responsible for certain questionable acts, R. 31, 938, 968, 970-980), in order that, simultaneously with the imminent publication of the Joint Report, he could summarily seize all Pacific Mutual's assets, and effect a Rehabilitation, so as (*a*) to preserve the Company's valuable business as a "going concern," and (*b*) to avoid the loss inevitable upon disintegration where its 275,000 policyholders and creditors would be engaged in a race to get the most possible out of the wreckage (R. 234, 579-581, 1540).

4. He had obtained Court orders (by the voluntary appearance and consent of Old Company) authorizing his proposed acts (R. 33-4, 48-9, 142, 226); but his actions acquired no additional validity by the *orders,* as they were void because of the subsequently ascertained disqualification of EDMONDS, J., who happened to sign the early orders in this case (R. 323; OPINION R. 1526-7).

5. New Company ["as a corporate agent to assist" the Insurance Commissioner; R. 851, 1528, 1537-8] at once began functioning with the assets and business of Old Company, (*a*) by carrying on the old business to the extent that it had assumed Old Company's obligations, and (*b*) by continuing to write new business with the Old Company's office and agency organization (R. 850-1; OPINION R. 1528-9).

IV. *Objections to the proposed Rehabilitation; and the discovery that Edmonds, J., was disqualified.* Very promptly (August 6-11), Mr. Neblett and many policyholders, stockholders and directors of Old Company filed Intervening Petitions attacking the Rehabilitation proceedings for various reasons (*i. e.,* fraud, false representations, conspiracy, preferences, incapacity and malfeasance of the old management for past ten years, etc.); and as in violation of (*a*) the California law, and (*b*) the "due process", "equal protection" and "contract" clauses of the Federal Constitution (R. 233-321).

On August 11 it unexpectedly developed that EDMONDS, J. had a $5,000 policy in Old Company (R. 323);

and consequently his five orders of July 22-23 (R. 34, 49, 103, 142, 226) were *ipso facto* void (OPINION R. 1526-7).

V. ***Carpenter re-appointed as Conservator; his prior appointment ratified; directed to operate the business and to submit a Plan of Rehabilitation.*** On August 11, the Court (WILLIS, J.), considered anew the Commissioner's application to be appointed Conservator and Old Company's consent thereto, both filed July 22, 1936; and the Court found [and entered an order that Insurance Commissioner had found R. 324] that Old Company is "insolvent" and "is in such condition that its further transaction of business will be hazardous to its policyholders, its creditors and to the public." To safeguard the situation, the Court (WILLIS, J.), also *ratified* the order of July 22 appointing Carpenter as Conservator; then *re-appointed* him as Conservator; vested in him the fee simple title to all Old Company's assets; directed him to operate Old Company's "business and affairs . . . as a going insurance business"; and to prepare a rehabilitation plan to be submitted to the Court (R. 1, 33, 322-328, 997-1001; OPINION R. 1521-2, 1529).

On August 17 the Court (WILLIS, J.) directed the Conservator and New Company to continue to perform under the earlier plan of rehabilitation of July 22-23 (R. 351, 1395, OPINION R. 1528-9).

VI. ***Why California adopted Rehabilitation instead of a sale in Liquidation.*** Upon the Commissioner's "finding" that Pacific Mutual was insolvent, his

summary seizure of its assets, and his application to the State Court (p. 7, *supra*, R. 3, 324-5, 997-1001, 1525, 1528-9),—as Bankruptcy and a Federal equity receivership are denied to insurance companies, p. 3, *supra*, —the Commissioner had to decide whether (*a*) to ask for appointment as Liquidator to "liquidate and wind up the business," or (*b*) to enter into a Rehabilitation Agreement (Ins. Code §§1013-1019, 1043; OPINION R. 1533-4.

California (acting through its Insurance Commissioner, and in accordance with its public policy) decided that it was impossible to remove the causes which led to the Pacific Mutual's difficulties; and that, instead of liquidating the company, with the consequent delay, waste, losses, and uncertainty as to the various "measures of damage," applicable to the many different groups of policies, it was preferable [through the organization of a New Company and entering into a Rehabilitation Agreement with it] to reorganize—not Old Company *as a corporation*, but the *business* which Old Company had—and to save it as a "going concern" in order to realize the millions of dollars of asset value in its agency force and in its "going business"; thereby to continue insurance protection for those needing it, particularly those who had become uninsurable; and ultimately to pay 100% on all policy obligations (pp. 18, 20, 21, *infra;* OPINION R. 1528, 1534-5).

For these reasons, in this case, California determined upon Rehabilitation instead of "liquidation." It is impossible here to consider the wisdom of that course, as the seven weeks' testimony on the subject is not

included in the Record. The State acted; and the Supreme Court of the State has sustained that action in every particular.

VII. *Revised Rehabilitation Agreement; objections thereto; and Order to Show Cause.* On September 25, 1936 (after extended conferences between the Insurance Commissioner, his legal and actuarial advisers, policyholders, stockholders, general agents and creditors of Old Company, R. 1271-2, 1523-4), the Insurance Commissioner submitted a revised Rehabilitation Plan, and petitioned (*a*) for authority to execute it, and (*b*) for a ratification of his *ad interim* actions in carrying on the business (R. 846-904).

On the same day, the Court entered an "Order to Show Cause" why the Court should not authorize and confirm the revised Rehabilitation Plan and all actions of the Commissioner and New Company theretofore taken (R. 905-913).*

In the meantime, there were filed other proposed plans for liquidation or reorganization [135 printed pages; including the original and revised "Giannini" plan for "liquidation" R. 1172-1188, 1350-1368; OPINION, R. 1524]. About *sixty* Intervening Petitions and Responses to the order to show cause were also filed on behalf of *two hundred* policyholders, stockholders

*Ordering notice to be given parties litigant, Insurance Commissioners of all States where Old Company did business, and to each policyholder and creditor of Old Company, by first class mail, posting and newspaper publications; Order returnable October 19, 1936 (R. 905-913).

On October 8, the Court (WILLIS, J.) amended, *nunc pro tunc*, the orders of July 22 and August 11, by slightly altering certain recitals, in order that the orders might "recite the facts actually appearing to the court" at the time the orders were entered (R. 997-1001; OPINION R. 1524; Cf. R. 34, 323).

and agents of Old Company, and Insurance Commissioners of various States (720 printed pages)—the Insurance Commissioner of Louisiana, the Old Company's General Agents, and one Policyholders' Committee supporting the Insurance Commissioner's revised Rehabilitation Plan, while all the others attacked the Plan on many grounds—both under the California law, and under the "due process" and "contract" clauses of the Federal Constitution.†

VIII. *Seven weeks' Judicial Hearing on the revised Rehabilitation Agreement and Objections thereto.* For about seven weeks (October 19-December 4), the Court (WILLIS, J.) held continuous hearings for, and against, the Rehabilitation Plan, during which "many persons representing various interests were represented"; "evidence both oral and documentary" was introduced; and "full opportunity afforded to all persons . . . to state, discuss and urge any and all objections they, or any of them, might have to the proposed rehabilitation and reinsurance agreement or to these proceedings", including various plans different from that proposed by the Commissioner* (R. 1378-1383; OPINION R. 1524).

†R. 233-321, 329-464, 475-483, 538-547, 589-765, 773-827, 831-845, 914-989, 1002-1007, 1150-1159, 1192-1210, 1237-1245, 1274-1281, 1288-1297, 1314-1318.

*"One such plan was proposed by L. M. Giannini, who suggested the liquidation of the Old Company through a sale of the assets and business to him. This plan was endorsed by the insurance commissioner of the State of Washington, by two large groups of policyholders, and by various individual policyholders [including Mr. Neblett, R. 1347-1368]. . . . At the hearing full opportunity was given to all who appeared to submit evidence and argue their contentions" (OPINION, R. 1524). These suggested

THE COMMISSIONER'S REHABILITATION PLAN

The Rehabilitation Plan (47 printed pages; R. 1396-1443) contains many detailed and technical provisions unnecessary to be considered here. Its substantial provisions may be briefly summarized as follows:

I. Commissioner organized a New Company; subscribed for its entire $1,000,000 (par value) capital stock; paid for it with $3,000,000 cash out of Old Company's assets, and thereby gave to New Company:

NEW COMPANY'S CAPITAL STRUCTURE	CASH
Capital Stock (fully paid up)	$1,000,000
Surplus (paid in)	2,000,000
Total Capital and Surplus (paid in)	$3,000,000

Commissioner thus retained as "trustee" for the benefit of Old Company's policyholders and creditors (p. 8, *supra;* R. 1404; OPINION R. 1526, 1534, 1539),

(*a*) Entire $1,000,000 capital (par value) stock of New Company (represented by $3,000,000 cash);

(*b*) All assets of Old Company (except the $3,000,000 cash paid to New Company for its entire capital stock); and

(*c*) Old Company's claims on account of any wrongful acts of its officers, directors, etc.

Plans cover about 135 pages (R. 1056-1094, 1172-1191, 1211-1232, 1319-1377).

The Giannini plan (which was favored by most of the opposition) was based on the same legal principles as the Commissioner's plan, to wit, 100% re-insurance of Life policies; and a *graduated scale of reduced percentages* of re-insurance for Non-Can policies —to be restored to 100% only so far as certain funds made restoration possible.

II. Commissioner then transferred to New Company (*b*) *supra*, viz., all of Old Company's remaining assets [except (*a*) and (*c*)], which had a value of over $210,000,000 on December 31, 1935* (R. 1388; 1397-8).

III. New Company agreed to "re-insure and assume" as of July 22, 1936, Old Company's liability under all its policies (including "Non-Can" policies) in force on July 22, 1936, subject to the following provisions (R. 1400, 1412):

A. ALL POLICIES OF EVERY KIND (EXCEPT "NON-CAN" POLICIES):

New Company Agreed

(1) To "re-insure and assume" [100%] Old Company's entire liability on all such policies in force July 22, 1936, including Life, Endowment, Accident and Health Insurance, Annuities, etc. (R. 1400-1402, 1410);

(2) To "*pay in full . . . all policy claims* against the Old Company," whether arising *before or after* July 22, 1936, to-wit: Death losses, Annuities, Disability, Accident and Sickness Benefits, etc., etc. (R. 1402-3);

(3) To establish separate "Participating" and "Non-Participating" Life Departments; and to allocate to them, for their respective separate benefits, that portion of Old Company's assets appearing on its Life Department's books on July 22, 1936† [less $4,792,118.97] in the ratio in which such assets stood credited to the "Participating" and "Non-Partici-

*Increased by normal premium and interest receipts (less disbursements) to about $220,000,000.

†On Dec. 31, 1935 this was.....$188,000,000 (R. 22)
On July 22, 1936 this was..... 191,500,000

pating" Departments respectively (R. 1403-4; 1408-9);

(4) To "establish reserves against all policies and policy liabilities of the Old Company subject to assumption or re-insurance hereunder" in accordance with the Commissioner's requirements (R. 1421).

(5) To pay to the Liquidator an amount equal to the Reserves so originally established on July 22, 1936, against the policies of those who became *non-assenting* policyholders (R. 1422).

B. All "Non-Can" Policies:

New Company Agreed

(1) To establish reserves as required by the Commissioner (*a*) for full [100%] benefits on all **Disabled** Lives, and (*b*) for the reduced benefits [20% to 90%] on **Active** Lives (R. 1421, 1413-1415).

(2) **Disabled Lives***; **"To pay all disability benefits under Non-Can Policies** for disabilities commencing *prior"* to July 22, 1936, to-wit: to pay all monthly income benefits which had fallen due *in the*

*The expressions (1) "Active Lives" and "Active Life Reserves," and (2) "Disabled Lives" and "Disabled Life Reserves" refer, respectively, to the policies and to the mathematically calculated Reserve thereon, of those persons holding "Non-Can" policies (1) who have *not* become disabled, *i. e.*, are still *active, healthy* persons, and (2) who have become *disabled*, and who are entitled to receive *monthly* Disability Income Benefits so long as they live and continue disabled.

The reserve per $100 monthly benefit *is much larger* for a *Disabled* Life than for an *Active* Life, because the probability of the Company having to pay future successive monthly benefits *is tremendously greater* in the case of an *already* Disabled person (where the sole contingency is whether he will *live* disabled until the successive payments fall due), than it is in the case of an *Active* Life (healthy person) where *two* contingencies must *both* occur before the Company will have to pay anything, *i. e.*, (i) he must *become disabled*, which is only a possibility, and (ii) even after becoming disabled, he must also live disabled; and (iii) at worst, a comparatively small percentage of healthy persons become disabled.

past or should become due *in the future* on *Disabled* Lives, where their disability commenced *prior* to July 22, 1936;

To pay to the Liquidator an amount equal to the Disabled Life Reserve so originally established under (1) *supra* against the policies of those who became *non-assenting* policyholders (R. 1415, 1421-1422);

(3) **Active Lives**: To "reinsure and assume" as of July 22, 1936, Old Company's liability under Non-Can Policies upon *Active Lives* (*i. e.*, policyholders who were *not* disabled on July 22, 1936); **but only for 20% to 90% of the original monthly Income Benefit provided in Old Company's Non-Can Policies** (R. 1412-1414), to-wit:

POLICIES ISSUED IN	PERCENTAGE ASSUMED
1918–1920	20%
1921–1925	35%
1926–1928	45%
1929–1930	55%
1931	65%
1932–1935	90%

To pay to the Liquidator an amount equal to the Active Life Reserve so originally established under (1) *supra* against the policies of those who became *non-assenting* policyholders [R. 1421-1422].

C. ACCIDENT AND HEALTH DEPARTMENT:

To establish a separate Department for its Accident and Health Insurance (including Non-Can Policies), and to allocate thereto (R. 1410),

(*a*) $1,792,118.97; and also
(*b*) The (nearly) $27,000,000 assets* credited on Old Company's books to its Accident and Health Department as of July 22, 1936.

IV. From the funds available for its general corporate purposes [including certain earnings aris-

*On Dec. 31, 1935 this was.....$27,000,000 (R. 22)
On July 22, 1936 this was..... 26,400,000

ing from the Participating, and all earnings arising from the Non-Participating and Accident and Health Departments] New Company shall transfer all such funds (not reasonably required for its proper conduct as a "going concern"), to a **"Special fund"** for the restoration of benefits under Non-Can Policies; the **"Special fund"** to be used for the purpose of paying additional disability benefits on Non-Can Policies in excess of the amounts required to be paid (p. 17, *supra*), to the end that Non-Can Policies may ultimately receive [100%] all benefits, with 3½% interest on the deferred restorations (R. 1416-1419).

V. New Company agreed:

(1) To pay in full Old Company's State and Federal taxes, wages, salaries, pensions, current bills and expenses incurred prior to July 22, 1936 (R. 1419-1420); and

(2) To pay to the Liquidator certain sums [as provided for in the Agreement] towards enabling the Liquidator to pay *non-assenting* policyholders' claims, in the amounts finally allowed against the Liquidator (R. 1422-1427).

VI. Any Old Company policyholder who does not assent to the Rehabilitation Agreement (for brevity called a *dissenting policyholder*) has the right to file his claim with the Commissioner (as Liquidator) and prove the damage he has suffered by the Old Company's breach of contract; and participate *pro rata* in the Liquidator's distribution of Old Company's assets in his hands (Ins. Code §1019-1025).

The substantial effect of the Rehabilitation Agreement is for New Company (with over $215,000,000* assets),

(*a*) To pay [100%] all Old Company's floating debt, and insurance liabilities (matured as of July 22, 1936) such as Death Claims, Disability Claims, Annuities, etc.;

(*b*) To assume [100%] all insurance liabilities (except Non-Can Policies);

(c) To assume [100%] all insurance liabilities under Non-Can policies—as to **Disabled** Lives—so as to pay [100%] all *past and future* Disability payments on account of disability which commenced prior to July 22, 1936;

(*d*) To assume Non-Can policy liabilities—as to **Active** Lives—to the extent of 20% to 90% of the benefits thereunder;

(*e*) To set aside certain funds and future Surplus earnings into the "**Special fund**" to be used towards ultimately paying [100%] benefits on all Non-Can Policies [**Active Lives** on July 22, 1936] with 3½% interest on the deferred restorations; and

(*f*) To pay the Liquidator (1) an amount equal to the **Reserves** established on July 22, 1936 by New Company for all policyholders who later became *dissenting* policyholders, and (2) a portion of the future profits.

*$223,000,000 on July 22, 1936.

Any *dissenting* policyholder can file his claim with the Liquidator; establish the amount of his damage for Old Company's breach of contract, according to whatever rules of law are applicable thereto; and participate in the Liquidator's distribution of all the funds in his hands among the claims filed with him—such funds consisting of (1) the Reserves, (2) further sums proportional to the **"Special fund"** just mentioned, (3) entire capital stock of New Company, and (4) any recoveries arising from wrongful acts of Old Company's officers, directors, etc.

The Rehabilitation Plan *did not compel* any policyholder to accept the Plan. If he rejected the Plan, he retained all his rights against the insolvent Company and its Liquidator. The Rehabilitation Plan thereby avoided questions which have arisen in various reorganization cases as to the power of a majority (no matter how large) to compel a minority (no matter how small) to consent to the majority's Rehabilitation Plan.*.

IX. *Judicial approval of revised Rehabilitation Agreement.* On December 4, 1936, the Court (WILLIS, J.) entered the Order (sought to be reversed here by

*(See "Binding the Dissenter under State Reorganization Laws" 48 Harvard Law Rev. 1414-1428, and "State Control of Dissenting Minority Creditors in Municipal Debt Readjustments" 50 Harvard Law Rev. 946-956, for a full collection of laws and decisions thereunder; Shanks' "The Law of Railroad Reorganization as Affecting Institutional Investors" (1935) p. 328, 340; Mason's "Some Legal Phases of Bank Reorganizations" pp. 57, 60, *et seq.*; "Constitutionality of Recent Legislation Relating to Merger, Consolidation or Reorganization of Banks as Affected by Rights of Dissenting Creditors or Stock-holders," 92 A. L. R. 1337-1342, 96 A. L. R. 1445; Cf. Cardozo J.'s dissent in *Ashton* v. *Cameron Dist.*, 298 U. S. at p. 541.)

certiorari), which found and decreed, in substance, as follows:

(1) On July 22, 1936, Old Company's *liabilities* exceeded its *assets* [by about *eighteen million dollars*, R. 31]; and it "was in such condition that its further transaction of business would be hazardous to its policyholders, creditors and to the public"; its assets "would be of substantially less value if they were sold separately . . . than if they were sold as a going concern"; and its "intangible assets" as a going concern were worth "several million dollars" (R. 1385-6).

(2) The revised Rehabilitation Plan made "adequate provision" for "every class of policyholders, creditors and stockholders"; did not unfairly discriminate in favor of any class thereof; but "fairly and equitably" protected the rights of "all persons", and was "fair, just and equitable" (R. 1385-7).

(3) The "Rehabilitation Plan" was approved; its execution was authorized, together with any necessary or proper deeds or transfers of further assurance; and the past acts of the Insurance Commissioner as Conservator, in organizing New Company, and in carrying on Old Company's business *ad interim* as a going concern, were also ratified and approved* (R. 1378, 1387-8, 1392-5).

*A purported Oral Opinion of the Court (WILLIS, J.) and subsequent colloquy with Counsel, appears in the Record (R. 1469-1508), but it was not included in the Record as certified by the State Court Clerk; and the Supreme Court of California held that it was no part of the Record on Appeal and could not be considered a part of the Record (OPINION R. 1530).

X. *Appeal from the December 4th Order.* Nearly all of Old Company's 275,000 policyholders of every kind, have accepted the revised Rehabilitation Plan.* Only *four* persons, viz.: Mr. Neblett (holding one *Life* policy) and Messrs. Bettin, Dickinson and McDonald (each holding one *"Non-Can"* policy) appealed from the Order of December 4th—and they on the "Judgment Roll" alone, without any Bill of Exceptions, so that none of the seven weeks' evidence was in the Record, which merely consisted of pleadings and orders (R. 1445-6, 1457, 1468; OPINION R. 1517-8, 1526, 1529).

The appeal, therefore, presented nothing but bare questions of State and Federal law arising on the face of those pleadings and orders, with the conclusive presumption that the evidence established all the facts necessary to sustain the orders (OPINION R. 1528-1530, 1539, 1540, 1543; p. 40 note, *infra*).

Mr. Neblett, *et al.*, urged several Federal, and many *non*-Federal, grounds of attack, the latter being based on California's Constitution, statutes, and rules of local practice.

XI. *Supreme Court of California affirmed the December 4th Order; approved the Rehabilitation Plan; and authorized its execution and full performance thereunder.* On December 7, 1937, upon oral arguments and elaborate Briefs (440 pages), the Supreme Court of California *affirmed* the judgment below—the reasons

*As the Record closes with the December 4, 1936 order approving the Plan, it does not show the elections to accept (Cf. R. 1440); but the correctness of the above statement is easily shown by the Company's Annual Statements of December 31, 1936-1937 (Cf. Spectator Life Index 1938, p. 63).

for its rejection of each procedural and *non*-Federal ground of attack (with page references to the OPINION) being summarized in the margin† (*Carpenter* v. *Pacific Mutual*, 10 Cal. (2d) 307; R. 1509-1544).

†1. Insurance Commissioner could (without any prior Court Order) lawfully seize Old Company's assets and business, and organize a New Company to assist him in the operation thereof (R. 1527-8, 1533).

2. The five void orders (Edmonds, J., July 22-23), did not invalidate any subsequent orders by WILLIS, J. The latter stand by themselves independently of the prior void orders (R. 1527).

3. WILLIS, J. (a qualified Judge), adopted, confirmed, ratified, and re-enacted the prior July 22 void order [appointing the Insurance Commissioner as Conservator] of the disqualified Judge (R. 1527-8).

4. WILLIS, J., validly and independently appointed the Insurance Commissioner Conservator (R. 1522, 1529).

5. Insurance Commissioner as Conservator [and without prior appointment as Liquidator, R. 1542] has power to form New Company (R. 1535), and then, with Court's approval to enter into a Rehabilitation Agreement with New Company (R. 1542) in order to take over the business of the insolvent Old Company (R. 1537-8); and the Rehabilitation Agreement here was within the contemplation of the California law, Sec. 1043 (R. *Id.*).

6. All of the Insurance Commissioner's *acts* were subsequently validly ratified and approved by WILLIS, J. (R. 1522, 1528, 1529).

7. The use of "Mutual" in New Company's corporate name was not fraudulent or improper (R. 1544).

8. Insurance Commissioner's subscription to New Company's stock did not violate California's Constitution (Ar. 12, Sec. 13) prohibiting the State from subscribing for corporate stock (R. 1543-4).

9. New Company's stock was validly issued; and even if Insurance Commissioner's "permit" were necessary, it is "conclusively presumed" to have been secured (R. 1542-3).

10. Insurance Commissioner (as Conservator) could convey assets of Old Company to New Company, even before his appointment as Liquidator (R. 1528-9, 1542).

11. Insurance Commissioner's transfer (as Conservator) of Old Company's assets to New Company did not violate California's "fraudulent conveyance" statute (R. 1536-7, 1541-2).

12. In an appeal (as here) on the "judgment roll," R. 1445, 1529, it is "conclusively presumed" that Findings of Fact were waived (R. 1530), a presumption that cannot be overcome by (*a*) inserting an uncertified purported colloquy (R. 1530; Cf. R. 1469-1508), or (*b*) an affidavit attached to a Brief (R. 1530); and,

That decision settles everything except the Federal grounds, viz. whether the December 4th Order (and the Rehabilitation Plan signed thereunder) violates the Federal Constitution's "due process" and "contract" clauses; which Federal grounds were likewise denied by the California Supreme Court (OPINION R. 1535, *et seq.*).

XII. *Certiorari granted.* Four policyholders (Mr. Nebiett, *et al.*) petitioned for *certiorari*, assigning many *non*-Federal grounds; but also specially claiming that the Rehabilitation Plan (carried out by State legislative authority† *Appleby* v. *Delaney*, 271 U. S. 403, 409) impaired the obligation of the "Non-Can" policy contracts, and denied "due process" to "Non-Can" policy holders, by removing Old Company's assets beyond subjection to their claims (Petition, pp. 13, 16-17; Brief, pp. 54-56).

On May 16, 1938, *certiorari* was granted (304 U. S.).

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moreover, this was a "special proceeding" (R. 1530-1532) in which "Findings of Fact" are not required (*Id.*).

13. Old Company was insolvent not only on Dec. 31, 1935, but also on July 22, 1936 (R. 848, 999, 1001, 1385-6, 1528).

14. Rehabilitation (not liquidation) was necessary here (R. 1534-5).

15. In absence of any of the evidence on the seven weeks' trial, Court assumes that there was evidence to sustain trial Court's holding that there was no unfair discrimination (R. 1539-1541).

16. No evidence as to relative merits of different Plans (R. 1544).

17. As to equivalence of benefits given, Court assumes evidence sustains it (R. 1539).

†Cf. *Doty* v. *Love*, 295 U. S. 64, 71; *Milner* v. *Gibson*, 249 Ky. 594, 602; *Nagel* v. *Ghingher*, 166 Md. 231, 238, 240; *Re Mechanics Trust Co.*, 119 N. J. Eq. 141, 143; *Shepherd* v. *Mt. Vernon Trust Co.*, 269 N. Y. 234, 238; *McSweeney* v. *Equitable Trust Co.*, 16 N. J. Misc. 193; *Matter of People*, 264 N. Y. 69, 81.

XIII. *"Due process" in the procedural sense was abundantly given.* The four petitioners and all interested parties appeared and actively participated in the elaborate seven weeks' trial in the lower State Court —with no objections or exceptions shown—and also in the appeal to the Supreme Court of California (R. 1451-1462, 1514-1516), which decided that the procedure followed complied with every statutory requirement (OPINION R. 1531-1537; *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276, 282).

In the light of those facts, there was no denial of "due process" in the *procedural* sense (*Davidson* v. *New Orleans,* 96 U. S. 97, 105; *Twining* v. *New Jersey,* 211 U. S. 78, 110; *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 168; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 384; *Standard Oil Co.* v. *Missouri,* 224 U. S. 270, 281, 287-8; *Dohany* v. *Rogers,* 281 U. S. 362, 365, 369; *Doty* v. *Love,* 295 U. S. 64, 70, 71).

Therefore, the "due process" ground is reducible to the assertion that California (1) has impaired the obligation of the "Non-Can" policy contracts, and (2) has thereby prevented the "Non-Can" policyholders from enforcing their alleged vested legal rights against Old Company's assets, all of which assets petitioners insist ought to be *immediately available* for subjection to the claims of Old Company's creditors (*Coombes* v. *Getz,* 285 U. S., at p. 448).

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*Reasons 1, 2, 3, 6, 7 (Petition, pp. 12-15, 17-22) and Points A, B, C, D, E, F, G, H, I (Brief, pp. 33-53) are *non*-Federal; and they are foreclosed by the decision of the Supreme Court of California as matters of purely local law or statutory interpretation (*Standard Oil Co.* v. *Missouri,* 224 U. S., at p. 287; *North Laramie Land Co.* v. *Hoffman,* 268 U. S., at p. 282; *Dohany* v. *Rogers,* 281 U. S., at p. 365).

XIV. *Rights of policyholders under Liquidation and Rehabilitation.* Before considering Petitioners' grievances against the Rehabilitation Plan, it will be convenient at this place to note (1) the "measures of damage" applicable to the different groups of policyholders in the event of Liquidation, and (2) their rights on Rehabilitation.

Measure of Damages.

I. *In the event of liquidation:* The rights and liabilities of Old Company, its creditors, policyholders, shareholders, and all other persons interested in its assets, would be fixed as of the date of the Order of Liquidation "unless otherwise directed by the Court"; each claimant must file his claim with the Commissioner; each policyholder must establish his claim for damages for breach of contract, as of such date; receive his *pro rata* of the assets for distribution;* and the measure of damages for breach of his contract, by reason of the company's insolvency, is governed by the law of the place of performance.†

(1) In the case of *Life* policies, the *measure* of damages [governed by the law of California where the

*Ins. Code §§1016-1021; 8 Couch on Insurance §2043, notes; 32 C. J., pp. 1039-1040; 5 Cooley's Briefs on Insurance (2d Ed.), p. 4676; *The American Casualty Ins. Company's case*, 82 Md. 535, 569-70; *North River Ins. Co.* v. *Walker*, 65 F. (2d) 116, 118; *People* v. *Commercial Alliance Life*, 154 N. Y. 95, 99-101; *Johnson* v. *Button*, 120 Va. 339, 343; *Commonwealth* v. *American Life Ins. Co.*, 162 Pa. St. 586, 589; *Lovell* v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 274; *Carr* v. *Hamilton*, 129 U. S. 252, 256.

†2 Beale's Conflict of Laws §413.1; *Bell* v. *Lamborn*, 2 F. (2d) 205, 208; *Randolph Grocery Co.* v. *Lamborn*, 3 F. (2d) 139; Conflict of Laws Restatement, §413.

contract was to be performed, as the Old Company promised to make all payments at Los Angeles, Id.; *Ofield* v. *National Ben. Life Ins. Co.*, 293 S. W. 271, 273] is the value of the policy at the date of insolvency (8 Couch on Insurance, §2043; 32 C. J. 1039-1040; *Lovell* v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, 274-5; *Carr* v. *Hamilton*, 129 U. S. 252, 256), which value would be (*a*) at a minimum, the policy's cash surrender value, or (*b*) at a maximum, the excess of the present worth of future benefits over the present worth of future premiums expected to be paid viz. Reserve (*Garland* v. *Jefferson Standard Life Ins. Co.*, 179 N. C. 67, 73; *American Insurance Union* v. *Woodard*, 118 Okla. 243, 250-1; Nash's "The Measure of Damages upon Breach of a Life Insurance Contract" (1936) p. 709).

(2) In the case of *"Non-Can"* policies, the *measure* of damages* has not been considered by any Court.

I. For "Non-Can" **Disabled** Lives the measure would probably be the present value of the future disability monthly income expected to be paid according to the disability.

II. For "Non-Can" **Active** Lives three measures have been suggested—each widely different in principle and producing differences in amount, viz.:

*This measure of damages is also governed by the law of California. Mr. Neblett may claim that it should be governed by the law of the place where the contract was made; in which latter event, there would be forty-odd *different* "measures of damage," varying according to the laws of the forty-odd States in which contracts were made. Such a situation would result in intolerable delay, expense and trouble to determine the forty-odd *different* "measures of damage," to be applicable to the forty-odd *different* State groups of policyholders.

A. A *pro rata* part of the last annual premium—resulting in a *negligible sum*,—because of the *uncertainty* that a healthy policyholder will ever become disabled; and his consequent inability to establish any substantial damages.* If that is the correct "measure of damage," full payment of all claims for damages is available to everybody.

B. All premiums paid (with interest thereon from dates of payment)—a sum greatly in excess of the entire "Non-Can" Reserves as calculated by the Commissioner—based on an *erroneous analogy* to the rule in a few States in cases of *wrongful cancellation* of Life policies; a rule rejected in most States as inequitable, because it fails to consider or give credit for the *value of the protection* which the policyholder undoubtedly had up to the time of *wrongful* cancellation† (See *Mutual Reserve Fund* v. *Ferrenbach*, 144 Fed. 342, 344-346, for a full discussion and refutation; Nash *op. cit.*, p. 715).

Loyal Friends of American Assn. v. *Center*, 49 S. W. (2d) 898, 901 (Texas); *The American Casualty Ins. Company's case*, 82 Md. 535, 570; *Usher* v. *Sarco Co.*, 100 N. J. Eq. 428, 429-31; *Kipp* v. *Fidelity Title & Mortgage Co.*, 116 N. J. Eq. 409; *In re Mechanics Trust Co.*, 119 N. J. Eq. 141; *Johnson* v. *Button*, 120 Va. 339, 343; *North River Ins. Co.* v. *Walker*, 65 F. (2d) 116, 118 (C. C. A. 8th); *Smith* v. *Nat'l Credit Assn.*, 65 Minn. 283; *State* v. *Minn. Title Ins. & T. Co.*, 104 Minn. 447, 19 L. R. A. (N. S.) 639 note; *Vicars* v. *Mutual Benefit H. & Acc. Ass'n*, 259 Ky. 13, 17; *Phillips* v. *Pantages Theatre Co.*, 163 Wash. 303; Ins. Code, §§481, 10111; Civil Code, §3358.

†The conflicting rules as to the "measure of damage" in cases of wrongful cancellation of Life policies, are collected in 48 A. L. R. 110, *et seq.*; 107 A. L. R. 1235, *et seq.*

C. Value of the "Non-Can" policy at the date of insolvency, *i. e.*, excess of the present worth of anticipated future disability payments over the present worth of anticipated future premiums to be paid —both calculated upon some Disability Table [either that used in the calculation of the premiums or that adopted by the Commissioner in calculating the Reserve or by the Court in the liquidation proceedings] —which is much less than the Reserve on a "Non-Can" policy. The rule for applying this measure of damage, has been fully worked out in the case of *Life* policies—in the Federal Courts and in most of the State Courts (which have considered the subject)—and hence is easily adaptable to "Non-Can" policies (8 Couch on Insurance, §2043, notes 12, 13; 32 C. J. 1039, note 37; *Lovell* v. *St. Louis Mutual Life,* 111 U. S. 264, 374-5; *Carr* v. *Hamilton,* 129 U. S. 252, 256; *Mutual Reserve Fund* v. *Ferrenbach,* 144 Fed. 342, 345-6 (C. C. A. 8th), and cases there cited; *Garland* v. *Jefferson Standard Life,* 179 N. C. 67, 73; *American Ins. Union* v. *Woodard,* 118 Okla. 46, 248; *Ebert* v. *Mutual Reserve Fund,* 81 Minn. 116, 128. See annotations 48 A. L. R. 116; 107 A. L. R. 1237).

II. *In the event of Rehabilitaton:* Each policyholder has such rights as are accorded to him under whatever Rehabilitation Plan happens to be adopted by the California Insurance Commissioner (with the approval of the State Court).* This is so, because when an insurance company is in financial difficulties, the State, acting through its Insurance Commissioner, first

tries to remove the causes leading to these difficulties; if that be impossible, then to rehabilitate the business by some form of Rehabilitation Plan; and, only in the last resort, to liquidate the company's business (R. 1532-1534).

Such is California's public policy (OPINION R. 1532-1538).

SUMMARY OF POINTS DISCUSSED.

1. Mr. Neblett's right to object is limited to the effect of the Rehabilitation Plan on his Life policy; and he cannot question its validity as applied to "Non-Can" policies.

The Rehabilitation Plan (*a*) did not impair the obligation of Mr. Neblett's Life policy, and (*b*) did not deprive him of any property without due process of law. (pp. 31–43, *infra*)

2. "Non-Can" policyholders who were Disabled Lives on July 22, 1936, were re-insured 100%; and they have never objected to the Rehabilitation Plan.

The Rehabilitation Plan did not impair the obligation of the policies of such "Non-Can" (Disabled Lives). (pp. 44–46, *infra*)

3. The Rehabilitation Plan did not (1) impair the obligation of "Non-Can" Policies, on Active Lives, nor (2) deprive the holders thereof of their property "without due process of law."* Messrs. Bettin, *et al.*, have no just cause for complaint. (pp. 46-94, *infra*)

*We need not consider whether a Rehabilitation Plan may exclude a policyholder from his rights at law; because, in this case, if a policyholder did not care to assent to the Plan, it provided he should have his rights at law.

FIRST POINT.

I. Mr. Neblett's right to object is limited to the effect of the Rehabilitation Plan on his Life policy; and he cannot question its validity as applied to "Non-Can" policies.

II. The Rehabilitation Plan (*a*) did not impair the obligation of Mr. Neblett's Life policy, and (*b*) did not deprive him of any property without due process of law.

I. Mr. Neblett has only a single non-participating Ordinary Life Policy (No. 547,567). He does not have a "Non-Can" policy (R. 245, 1380, 1414, 1459, 1525).

Whatever Federal Constitutional grievance Mr. Neblett might have properly urged if he had been the owner of a "Non-Can" policy (and, as such, had also been one of the **Active** Lives), cannot be considered here, because he is limited to his *Life* policy and to the effect of the Rehabilitation Plan on himself and on *that* policy. He cannot appropriate for himself any grievance that "Non-Can" **Active** Lives may have on account of any *distinction in treatment* (i) between them and Non-Can **Disabled** Lives, or (ii) even between them and Life policies (such as Neblett's). This is so because the only person who can test the constitutionality of a State act is a person who is directly and adversely affected thereby; and he cannot espouse the cause of others differently situated.*

**Assaria State Bank* v. *Dolley*, 219 U. S. 121, 126 [Kansas Bank Guaranty law]; *Red River Valley Bank* v. *Craig*, 181 U. S. 548, 558; *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S.

II. Mr. Neblett's principal contention in the Trial Court was that the Rehabilitation Plan violated various provisions of California's Constitution and laws [R. 250-251, 1275—contentions entirely foreclosed here because decided adversely to him by California's highest Court, OPINION R. 1526-1544; pp. 22-24, *supra;* p. 34 note, *infra*].

Conceding [for argument's sake] that Mr. Neblett seasonably raised the Federal questions (*Gibbes* v. *Zimmerman,* 290 U. S. 326, 328), and that the Rehabilitation Plan adopted under Ins. Code, §1043, is an act of the State,* we must determine [A] whether it has deprived Mr. Neblett of his property "without due process of law," and [B] whether it has substantially impaired Mr. Neblett's means for the enforcement of his Life policy contract, or obstructed or derogated from his substantial contractual rights thereunder (*Hendrikson* v. *Apperson,* 245 U. S. 105, 113; *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 430, *et seq.*).

Let us consider those claims in order:

[A] *"Due process" claim.* Mr. Neblett's voluntary intervention in the Rehabilitation proceedings, the

134, 149; *Hatch* v. *Reardon,* 204 U. S. 152, 160; *Aluminum Co.* v. *Ramsey,* 222 U. S. 251, 256; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Hampton* v. *St. L. Iron Mt. & S. Ry.,* 227 U. S. 456, 469; *Arizona Employers' Liability cases,* 250 U. S. 400, 429; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488; *Rindge* v. *Los Angeles,* 262 U. S. 700, 710; *Smith* v. *Cahoon,* 283 U. S. 553, 562; *Columbus & Greenv. Ry.* v. *Miller,* 283 U. S. 96, 100; *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 513; Cf. *Hagar* v. *Reclamation District,* 111 U. S. 701, 712.

C. B. & Q. R. v. *Chicago,* 166 U. S. 226, 233; *Georgia Power Co.* v. *Decatur,* 281 U. S. 505, 508; *Grand Trunk Western R. Co.* v. *Railroad Co.,* 221 U. S. 400, 403; *Appleby* v. *Delaney,* 271 U. S. 403, 409.

seven weeks' judicial hearing and his active participation therein, his appeal to the Supreme Court of California, with his Briefs and Oral Argument, and that Court's elaborate consideration of all his contentions (R. 245, 1274, 1347, 1378, 1380, 1383, 1446, 1514), certainly satisfies every essential of *procedural* "due process," including jurisdiction of the person and subject-matter, a competent and impartial tribunal, notice, opportunity to be heard, full participation in the hearing, and elaborate consideration and decision by the State Courts (pp. 22-25, *supra*, and cases there cited).

The Supreme Court of California held that, under the California Insurance Code, (*a*) the Commissioner had the right summarily to seize the assets of Old Company, and to organize and use New Company as his agent in the administration of Old Company's affairs, and (*b*) the assets were validly transferred from Old Company to the Commissioner, and from him to New Company (OPINION R. 1528-9, 1541).* The California Court's interpretation of the California law, and its

*The Supreme Court of California said:

"Here the transfer was made pursuant to a valid statute after court approval. . . . The commissioner, as already held, **validly took possession of the assets** of the old company on July 22, 1936. On August 11, 1936, he was **validly appointed conservator**, his prior acts approved, and his title to the assets expressly confirmed. By operation of law, pursuant to the express terms of the statute, **title to all of the assets of the old company became legally vested in the commissioner as trustee for all creditors. The transfer of these assets** from the commissioner to the new company **occurred pursuant to statutory authority and order of court.**"

decision that the procedure followed complied with all statutory requirements, is conclusive here.†

Therefore, the only question open is whether California had the power, consistently with the Fourteenth Amendment, to do what it did in the Rehabilitation of Old Company.

First: California's power to authorize its Insurance Commissioner to determine whether a California insurance company is insolvent, or in a hazardous condition, and, if so, summarily to seize all its assets, and to administer them, including the Rehabilitation of the business and the transfer of the assets to a New Company organized for that purpose under a Rehabilitation Plan, is surely as unassailable as is the well settled power of Congress to authorize the Comptroller of the Currency, through a Receiver appointed by him, to find out whether a bank is insolvent; and, if so, summarily to seize possession of all of its assets, and dispose of them by sale, or by reorganization under the Bank Conservation Act, under which (different from the California method) dissenting depositors and stockholders are bound by the provisions of the reorganization; and the Comptroller's determination of the grounds for seizure is final and conclusive.*

†*Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281; *Quong Ham Wah Co.* v. *Industrial Comm.*, 255 U. S. 445, 448; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 282; *Midland Co.* v. *K. C. Power Co.*, 300 U. S. 109, 113.

*Act June 30, 1876 [19 Stat. 63] U. S. C. A. Title 12 §191; Bank Conservation Act March 9, 1933 [48 Stat. 2] U. S. C. A. Title 12 §§203, 207); *Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 673; *U. S.* v. *Knox*, 102 U. S. 422; *Rosenblatt* v. *Johnson*. 104 U. S. 462; *Bushnell* v. *Leland*, 164 U. S. 684; Cf. *Forrest* v. *Jack*, 294 U. S. 158, 162, note; *O'Connor* v. *Watson*, 81 F.

Second: In its last analysis, Mr. Neblett contends that he has been deprived of "due process" because the Supreme Court of California has [as he thinks] *erroneously decided* (1) what the California Code permits the Insurance Commissioner to do, and (2) the effect of a *qualified* Court's adoption, ratification, and confirmation of the Commissioner's *acts* taken under prior void orders of a disqualified Judge—clearly *non*-Federal questions.

Mr. Neblett's claim that he has been deprived of his property "without due process" is, therefore, reducible to his contention that California has impaired the obligation of his Life policy (p. 25, *supra;* 2 Willoughby on the Constitution [2d Ed.] §781).

[B] ***"Impairment of Contract" claim.*** The Rehabilitation Plan offered to Mr. Neblett [and to all other policyholders, *except* "Non-Cans" on **Active** Lives only] *two options,* with full opportunity to make a deliberate choice between them (R. 1440, 1525-6), to-wit:

Options Open to Mr. Neblett.

(1) New Company, with about $223,000,000 assets* would re-insure and assume [100%] Old Com-

(2d) 833, 836; 9 C. J. S. Banks and Banking §§746-750; *State Savings Bank* v. *Anderson,* 165 Cal. 437, affirmed 238 U. S. 611; *North American Bldg. Assn.* v. *Richardson,* 6 Cal. (2d) 90, 98, 100; *Wittnebel* v. *Loughman,* 80 F. (2d) 222-225.

*Constituting entire assets of Old Company, except any claims arising from wrongful acts of former officers, directors, etc.

On Dec. 31, 1935 this was.....$215,000,000 (R. 22)
On July 22, 1936 this was..... 223,000,000

pany's total liability under Mr. Neblett's policy (R. 1397-8, 1400, 1525); with maintenance of the full legal Reserve as required by Commissioner (R. 1409); no investment or re-investment of New Company's assets to be made without written approval of Commissioner (R. 1400); and acceptance to constitute a novation, thereby releasing Old Company from all liability under the assenting policyholder's policy;

Or,

(2) Neblett to file his claim with the Commissioner (as Liquidator and statutory successor of Old Company); to prove his damages for Old Company's breach of contract on becoming insolvent, according to such "measure of damage" as the California Courts should determine to be applicable (R. 1440 fol. 4319; R. 1422-3 fol. 4264, 4266, 4268; R. 1526; Ins. Code, §1016-1025, 1032); and then to participate proportionately (with all other policyholders rejecting re-insurance) in the payment of his claim out of

(*a*) *Cash equal to the Reserves* (established in accordance with the Commissioner's requirements) which New Company had established for those who became *non-assenting* policyholders [R. 1421-2 fol. 4263-4],

(*b*) New Company's future profits [R. 1422-3 fol. 4265-8; R. 1416 fol. 4247-8; OPINION R. 1525-6],

(*c*) New Company's $1,000,000 capital stock [with $2,000,000 cash Surplus; and with good will,

agency organization, and other intangible assets worth *several million dollars more,* R. 1404 fol. 4212; R. 1386; pp. 14-15, *supra*], and

(*d*) Anything realized from Old Company's claims arising from wrongful acts of its former officers, directors, etc. [R. 1397-8 fol. 4191, 4194].

The Rehabilitation Plan did not compel Mr. Neblett to accept its terms (R. 1422, 1440, 1525, 1538). *It merely made him an offer* (OPINION R. 1525, 1528).

* * * * * * * *

1. *If accepted,* the Plan gave him 100% preservation of all his present and future contract rights; and he could either

(1) Stop paying premiums and immediately receive the policy's full non-forfeiture Surrender Value *in cash,* or in "paid-up" or "extended" insurance, as he might prefer; or

(2) Continue paying premiums to keep his policy in force, with 100% re-insurance in, and assumption by, a solvent New Company, having (*a*) over $220,000.00 assets, and (*b*) full legal Reserve—a New Company relieved from much of the burdensome "Non-Can" liability which had caused Old Company's insolvency.

From a practical standpoint [whatever the "Non-Can" Active Lives might think about the effect on *their* rights], the Plan offered Mr. Neblett, as a *Life* policyholder, a perfect method for

(1) The immediate collection of his policy's *full cash surrender value; or*

(2) Keeping his insurance in force; and, in the latter case, the collection of the *full face of his policy* at its future [perhaps distant future] maturity

—neither of which methods would have injured Mr. Neblett in any way; but either method would have put him in a better position than he was already in as a policyholder in an *insolvent* company, which, if liquidated at forced sale, could not begin to make him whole, whatever his "measure of damage" might be held to be.

Therefore, the Plan did not impair the obligation of his contract when it offered him *something better* than he would otherwise get (*Bernheimer* v. *Converse*, 206 U. S. 516, 530).

2. Nevertheless, Mr. Neblett *rejected** the offer (as he had the right to do); but he cannot make that rejection the basis of a claim that California has impaired the obligation of his contract when it offered him the option just noticed (*Bernheimer* v. *Converse*, *supra*).

Mr. Neblett's rejection of the Plan left him with his full legal rights intact against the insolvent Old Company, to be enforced in accordance with the laws of California (Ins. Code, §1016-1027), to-wit: to file his claim with the Commissioner as Liquidator of Old Company, where it would be *allowed* (but not necessarily fully paid) in such an amount as the California Courts decided was the "measure of damage" against an insolvent Life Insurance Company, *i. e.*, the value of the policy on July 22, 1936.

*The Record does not *affirmatively show* a rejection. If Mr. Neblett prefers to appear as a *consenter* to the Plan instead of a *dissenter*, he may be so treated on this *certiorari*. But if so, the novation released the Old Company (R. 1441; Opinion R. 1538).

New Company agreed to pay such allowed claims, in the manner, and to the extent, as provided in the Agreement (R. 1526); and Mr. Neblett would participate with all other *dissenting* policyholders in the several different funds listed (pp. 17-19, 36-37, *supra*).

That also ensured him a full participation in the value* of Old Company's business as a "going concern," because the *entire capital stock* of New Company (which had taken over the profitable part of Old Company's business, assets and liabilities) carried with it all the equity in the New Company, and was held by the Commissioner "as trustee," for the benefit of *dissenting* policyholders (OPINION R. 1526, 1539), and Mr. Neblett would also participate in the other funds mentioned (pp. 17-19, 36-37, *supra*).

Did such a Rehabilitation Plan impair the obligation of Mr. Neblett's policy contract?

(*a*) Mr. Neblett urged the lower Court to direct a "*sale* of all the assets *within a limited time* to the highest and best bidder" (R. 1347-1349). As a creditor of an *insolvent* corporation, Mr. Neblett had no vested right [protected by the Federal Constitution] which would prevent California from changing the method, or offering an additional method, for the enforcement or collection of creditors' claims against an insolvent corporation (2 Willoughby on the Constitution [2d Ed.], §748; *Gibbes* v. *Zimmerman,* 290 U. S. 326, 332; "The Constitution of the United States does not confer upon the depositors a vested right of liqui-

*No part of which would he have received on liquidation.

dation at the hands of a state official," *Doty* v. *Love*, 295 U. S. 64, 70; *Dunn* v. *Love*, 172 Miss. 342, 354, 358; OPINION R. 1538).

(*b*) Who is to *determine* whether Mr. Neblett's Plan for an immediate sale of all the Old Company's assets to the highest and best bidder, was a *better method* than the Commissioner's Plan, for enforcing and collecting the claims of *Life* policyholders against an insolvent company [which is the only question he is entitled to raise, p. 31, note, *supra*)? **Obviously, some Court must make that decision.**

After a seven weeks' trial, the lower Court decided *against* Mr. Neblett's plea for liquidation, and *in favor of* the Rehabilitation Plan in controversy as the better plan (R. 1385-1387); and the Supreme Court of California affirmed that decision (R. 1541; pp. 57-8, *infra*).

Such was the decision of the California Courts on the facts.

(*c*) **In the absence* of any evidence whatever, this Court cannot find the facts differently from the State**

*In the absence of the evidence [*unless* the Rehabilitation Plan is *bad on its face*], the presumption of constitutionality prevails (*O'Gorman & Young* v. *Hartford Ins. Co.*, 282 U. S. 351, 358, notes 3, 4 and cases cited therein; *Fort Smith Light Co.* v. *Paving Dis.*, 274 U. S. 387, 391, 392; *Pacific States Co.* v. *White*, 296 U. S. 176, 185, 186; *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, 547-8; *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447-8; *Hodge* v. *Cincinnati*, 284 U. S. 335, 338; *Milner* v. *Gibson*, 249 Ky. 594, 609; *Loftus* v. *Dept. of Agriculture*, 211 Iowa, 566; see "Questions of Fact Affecting Constitutionality," 38 Harvard L. R. 6).

The State Court's determination of facts is conclusive in this Court (*Penn Oil Co.* v. *Minnesota*, 248 U. S. 158, 164). It is especially true in California that, where an appeal is taken (as here) on the Judgment Roll alone, if, from the facts adjudged by the trial Court, other facts may be inferred to support the judgment, such other facts will be deemed to have been inferred

Court; and Mr. Neblett cannot prove (1) that he has been injured, or (2) that he would have been substantially better off, if the Court had liquidated all assets of Old Company and applied them to the payment of all claims that might be established under the various "measure of damage" rules which the California Courts might adopt respecting the breach of the various kinds of contract involved, or (3) that the Rehabilitation Plan's provision for New Company's 100% re-insurance and assumption of all Old Company's liability to Mr. Neblett [or his optional right to have his claim allowed and to participate in the assets of Old Company, pp. 37-39, *supra*], thereby substantially impaired his right to enforce, or his opportunity to collect, damages for breach of contract under his policy.

(*d*) Mr. Neblett *rejected* 100% re-insurance and assumption in the New Company; and he demands that Old Company's $223,000,000 of assets shall be sold and distributed, among himself and all other policyholders whose claims are established, as damages for the breach of contract upon the Old Company's insolvency on July 22, 1936.

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by the trial Court; and, on appeal, no fact will be inferred contrary to what the trial Court might possibly have inferred to support the judgment—as the trial Court's determination of facts should be used to uphold, and not to defeat, its judgment (*Anglo California Trust Co.* v. *Oakland Rys.*, 193 Cal. 451, 460-61; *Willett* v. *Schmeiser Mfg. Co.*, 82 Cal. App. 249, 252-3; *Breeze* v. *Brooks*, 97 Cal. 72, 77; *Malmstedt* v. *Stillwell*, 110 Cal. App. 393, 399; *Kelling Collection Agency* v. *McKeever*, 209 Cal. 625, 628. To the same effect *Cross* v. *Georgia Iron & Coal Co.*, 250 F. 438 (C. C. A. 5th); *Morrison* v. *Regus*, 22 F. (2d) 804, 805 (C. C. A. 5th); *General Finance Co.* v. *U. S.*, 45 F. (2d) 380, 381 (C. C. A. 5th); *Life & Casualty Ins. Co.* v. *City of Florala*, 63 F. (2d) 195, 197 (C. C. A. 5th); *Wiggins* v. *Burkham*, 10 Wall. 129, 132; *McConnell* v. *McChord*, 172 Ark. 21, 22; *Wilson* v. *Trent*, 238 Ky. 551, 552; *Prehm* v. *Kindig* (Iowa; unreported), 232 N. W. 812.

To that contention (*d*) we respond:

First: California has provided a short and summary method by which Mr. Neblett can establish the amount (in dollars and cents) of his claim for damages against Old Company;

Second: The State has the right (consistently with the Federal Constitution) (1) to avoid the expense, waste and reduced amount realized from assets sold in forced liquidation; (2) to adopt appropriate means of applying an insolvent corporation's assets to the satisfaction of its creditors' claims other than by liquidation; and (3) to adopt any method to that end, so long as it does not substantially impair a creditor's fair and equitable participation in the value of the Company's assets, considering all the complex factors which must be taken into consideration in the case of an insolvent corporation, with $223,000,000 assets, doing business in over forty States, with 275,000 policyholders, having hundreds, if not thousands, of different situations presented as to the "measure of damage" and the method of ascertaining the amount thereof, arising from the great variety of policy obligations outstanding.

California secured to Mr. Neblett an equitable participation in Old Company's assets:

A. *If he assented to the Plan:* By organizing New Company, transferring to it most of the assets of Old Company, and then requiring New Company to assume 100% of Old Company's obligation to Mr. Neb-

lett. Such a method certainly did not impair the legal obligation which the insolvent Old Company was under to perform its contract with Mr. Neblett.

B. *If he dissented from the Plan:* He would receive as much as, or more than, he would in Liquidation, for the Supreme Court of California held that under the Rehabilitation Plan the assets were *far greater* than they would have been on Liquidation (R. 1386; OPINION R. 1539).

If Mr. Neblett had included in the Record all the evidence adduced in the seven weeks' hearing, such evidence may have conclusively established that the Rehabilitation Plan gave him, *whether assenting or dissenting from the Plan, very substantially more* than he could possibly have received from a forced liquidation. At any rate it must be so assumed here (p. 40 note, *supra;* p. 72, *infra*).

If Mr. Neblett desired to show that the Plan was so unfair as to violate the Federal Constitution, he should have included the evidence, from which the factual situation could have been considered by the Supreme Court of California, and in turn by this Court. By failing to do so, he waived that point (OPINION R. 1543).

The judgment below should be affirmed so far as Mr. Neblett is concerned.

SECOND POINT.

"Non-Can" policyholders who were Disabled Lives on July 22, 1936, were re-insured 100%; and they have never objected to the Rehabilitation Plan.

The Rehabilitation Plan did not impair the obligation of the policies of such "Non-Can" (Disabled Lives).

On July 22, 1936, at 1 P. M., there were a great many "Non-Can" policyholders who had *already become disabled;* and such persons are technically called "Disabled Lives."

It is needless to discuss their Federal Constitutional rights, or their supposed grievances, if any, against the Rehabilitation Plan, because:

(1) Not a single* Non-Can *Disabled* Life has ever objected to, or attacked, the Rehabilitation Plan, or appealed from the December 4 order to the Supreme Court of California, or joined in the Petition for *Certiorari;* and, therefore, Mr. Neblett (*Life* policy) and Messrs. Bettin, Dickinson and McDonald (Non-Can *Active* Lives) cannot espouse the cause of Non-Can *Disabled* Lives as of July 22, 1936 (See authorities cited p. 31, note, *supra*);

(2) Under the Rehabilitation Plan, New Company reinsured and assumed [100%] all Old Company's liability under Non-Can policies where the *disability had commenced prior* to July 22, 1936; and agreed "to pay

*One policyholder [Rabinowitz] objected to the Plan's requirement that notice of disability must be given in accordance with the policy's terms (R. 1310).

all disability benefits under Non-Can Policies for disabilities commencing *prior* to" July 22, 1936 (R. 1412, 1413, 1415). New Company thereby assumed and agreed to pay [100%] all Old Company's liabilities under all Non-Can policies on *Disabled* Lives as of July 22, 1936, including (*a*) all Disability payments that were *past due* on July 22, 1936; as well as (*b*) all *future* monthly income Disability payments (pp. 16-19, *supra*). To secure its obligation to such Disabled Lives, New Company had over $223,000,000 assets, with the full Legal Reserve on all such Disabled Lives—which, as a matter of pure mathematical calculation, amounted to $20,000,000 (R. 29).

(3) A "Non-Can" Disabled Life also had the option—as did Mr. Neblett—of *dissenting* from the Plan, in which event he was given the same right, as was Mr. Neblett (pp. 36, 38, 41, 43, *supra*) *i. e.* to file his claim with the Commissioner; to prove his damages (for Old Company's breach of contract on becoming insolvent) according to such "measure of damage" as the California Courts should determine to be applicable; and then to participate proportionately (with all other *dissenting* policyholders) in the payment of his claim out of the several funds in the Liquidator's hands as listed above (pp. 16-18, 20, *supra*). But, as the Record **does not reveal a single dissenting Disabled Life,** we must assume that *all* Disabled Lives *accepted* the Plan; and, therefore, it is unnecessary to consider the grievances, if any, of "Non-Can" Disabled Lives (R. 1441 fol. 4322); as the novation released Old Company from all liability to them (R. 1441).

Consequently, the Rehabilitation Plan certainly did not impair the obligation of any Non-Can policy (where the holder was a *Disabled* Life on July 22, 1936) in an *insolvent* insurance company; nor deprive such a *Disabled* policyholder of his property without "due process of law"; because, in lieu of his claim for *damages* against an *insolvent* company, the State (1) assured to him 100% reinsurance and assumption of his claim for *past* and *future* benefits, in a thoroughly solvent New Company, or (2) preserved his right to file his claim, have it allowed at law, and paid out of a greater sum than liquidation would have produced.

On this *certiorari*, the controversy is thus limited to the rights of the Non-Can **Active** Lives.

THIRD POINT.

The Rehabilitation Plan did not (1) impair the obligation of "Non-Can" Policies on Active Lives, nor (2) deprive the holders thereof of their property without due process of law.

Messrs. Bettin, *et al.*, have no just cause for complaint.

Active Lives. On July 22, 1936, Messrs. Bettin, Dickinson and MacDonald [hereafter collectively and individually referred to as Bettin] were *Active* Lives, each holding one "Non-Can" policy (R. 626, 681, 690, 1233).

Messrs. Bettin, McDonald and Dickinson (having *"Non-Can"* policies only) objected on the ground that

the Plan "is not the best possible plan," and if adopted, would render their policies "practically worthless" (R. 626-630, 681-687, 990-995, 1233-1236; p. 40, *supra*).

The Rehabilitation Plan offered to Bettin (and to all other "Non-Can" policyholders who were *Active* Lives upon July 22, 1936) a free choice between these two alternatives, to-wit:

First: New Company's reinsurance and assumption of a *reduced* Benefit on all "Non-Can" *Active* Lives (without any increase in future premiums to be paid, R. 1415), as follows:

(1) Whenever an Active Life shall become a *Disabled* Life *after* July 22, 1936, New Company will *immediately* pay only from **20% to 90%*** of the monthly

*The differences in the percentages of "Non-Can" Benefits (which New Company assumed) resulted from a "horizontal" percentage reduction in the **reserve** (*i. e.*, net liability) which was required for each of the several "Non-Can" groups with different premium rates. The Old Company had from time to time [1921, 1926, 1929, 1931 and 1932] brought out its new "Non-Can" policies with progressively increased premium rates or more restricted benefits. Such horizontal reduction of *approximately the same percentage* of the **reserve** (*i. e.*, net liability) caused the differences in the percentages of the [20% to 90%] *Benefits* assumed, because the policyholders (of the more recently issued "Non-Can" policies) will pay *more* and *larger* premiums in the future than those of the earlier issued policies. The policyholders of these more *recently* issued policies will fully pay for the *additional* percentages of Benefits assumed.

If a uniform "horizontal" reduction had been made in the *Benefits*, there would *not* have been a uniform percentage reduction in the *net liability* (*i. e.*, Reserve) of the Company under the several different premium groups. Had the Benefits under these policies been reduced by a uniform "horizontal" percentage, then the more recently issued policies would receive benefits much *less* than what their premiums were paying for, with the inevitable result that those policyholders would discontinue; and, thus, the only policyholders left would be those paying a very inadequate premium for even the reduced benefits, so that a *second insolvency* would result.

Disability Income that Old Company had promised; which, in the case of Bettin would be (R. 1412-1415):

Bettin 35%
Dickinson . . . . 35% (R. 990-1, fol. 2970; R. 1414)
MacDonald. . . . 45% (R. 1233, fol. 3699; R. 1414)

(2) New Company bound itself to transfer, from time to time, into a **"special fund"** New Company's funds available for its general corporate purposes (not reasonably required for its needs as a "going concern," p. 18, *supra*); such **"special fund"** to be applied to the payment of *additional* Disability Benefits to all "Non-Can" *Active Lives* who become Disabled Lives *after* July 22, 1936, to the end that all such Active Lives (becoming Disabled Lives) might ultimately receive full [100%] Disability Benefits, with 3½% interest upon the deferred restorations (R. 1387, fol. 4159; R. 1416-17);

Or,*

Second: To *dissent* from the Plan—[as Mr. Neblett did†]; in which event an Active Life was given the same right as was given to Mr. Neblett (pp. 35-38, *supra*), to-wit: to file his claim with the Commissioner; to prove his damages for Old Company's breach of con-

*The Plan allocated to every "Non-Can" *Active* Life substantially the same amount of assets whether he accepted or rejected the Plan. If he *accepted* the Plan, certain assets (*i. e.*, reserve) were placed behind his policy; and as future earnings accrued they would be added to those assets. If he *rejected* the Plan, precisely the same amount of assets would be turned over to the Liquidator, to-wit, (*a*) reserve, and (*b*) future earnings as they accrued (cf. R. 1410-1411, 1416-1417, 1421-1422).

†See p. 38 note, *supra*.

tract on becoming insolvent (according to such "measure of damage" as the California Courts ultimately determine to be applicable to a policyholder who was an *Active* Life on July 22, 1936); and then to participate proportionately (with all other *dissenting* policyholders) in the payment of his damage claim (so established) out of the several funds in the Liquidator's hands, as listed above (pp. 16-18, 20, *supra;* R. 1398, fol. 4193; Ins. Code, §§1019-1025; R. 1442, 1440).

As Bettin rejected† the Plan, he is a *dissenting* policyholder—entitled to all the remedies under this Second alternative.

* * * * * * * * * *

When the State winds up an *insolvent* business, it distributes the assets among the creditors, either (*a*) by converting the assets into cash by a forced sale, or (*b*) through some Rehabilitation designed to preserve the value of the business as a "going concern," so as to realize for the creditors the largest amount possible out of the assets.

The State has the right to administer the affairs of an *insolvent* corporation created under its own laws; and, in so doing, in order to avoid the waste and injury due to enforced liquidation* the State may, as a part of its police power, provide for the organization of a New Company to assume, in whole or in part, the obligations of the insolvent corporation, so as to prevent a

†See p. 38 note, *supra.*

**Van Schaick* v. *Title & Mortgage Guarantee Co.*, 264 N. Y. 69; *Shepherd* v. *Mt. Vernon Trust Co.*, 269 N. Y. 234; *Dunn* v. *Love*, 172 Miss. 342; *Dickinson* v. *Saunders*, 129 Fed. 16, 17; Fletcher—Cyclopedia Corporations, Vol. 7, §4840.

race of diligence between creditors, in order that the largest possible amount may be realized out of the insolvent corporation's assets, to the end that all creditors, foreign and domestic, may share equitably, and that the assets shall not be dismembered and sacrificed at less than their fair value (*Clark* v. *Williard*, 292 U.S. 112; *Manigault* v. *Springs*, 199 U. S. 473, 480; *Union Dry Goods Co.* v. *Georgia Public Service Corp.*, 248 U. S. 372, 375; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398; *Milner* v. *Gibson*, 249 Ky. 594, 606; *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504; *State* v. *Farm & Home Savings & Loan Assn.*, 338 Mo. 313; *McSweeney* v. *Equitable Trust Co.*, 16 N. J. Misc. 193; See also 2 Willoughby on Constitution [2d Ed.], §762; Vance's Interstate Aspects of the Liquidation of Insolvent Insurance Corporations (1935), pp. 343-4, 348-350, 352).

California determined to exercise its police power to that end.

Bettin's Theory that the "contract" clause prohibits the Rehabilitation Plan's application to "Non Can" (Active Lives).

Bettin contends that California has "impaired the obligation" of his "Non-Can" (**Active** Life) policy because of (*a*) the *impossibility* for a dissenting "Non-Can" **Active** Life *to subject assets* which the Plan transferred to New Company, and (*b*) the Plan's *difference in treatment* between "Non-Can" **Active** Lives and all other policies.

Bettin insists* (1) that all assets should be *converted into cash* through a liquidating sale and then distributed to all creditors in *strict arithmetical proportion* to the amounts of their claims as ultimately ascertained; or (2) that if any Rehabilitation Plan be adopted to preserve the value of the business as a "going concern" [through re-insurance by a New Company organized for that purpose], all policies

*In Bettin's "Opening Brief" in the Supreme Court of California (p. 9), he insisted that the purpose of the California law was,

> "either [1] liquidate them [insolvent insurance companies] and pay out every one according to the value of their policies, and thus wipe out the company, or [2] to acknowledge all of the obligations of the company and conserve the assets and try to rehabilitate the company."

The trouble with that theory is, *First: Liquidation* would cause enormous losses and shrinkage in the value of the assets; and great expense and delay in paying off the policyholders, on account of the difficulty to ascertain judicially "the value of their policies," according to the particular "measure of damage" applicable to each; and, *Second:* Rehabilitation on the basis of 100% performance of all its obligations would leave the Commissioner in as insolvent a condition as the Company was when it became insolvent. When Old Company was $18,000,000 insolvent, the Commissioner could not rehabilitate the business without providing for the $18,000,000 deficit. This *was* provided for by the Plan adopted.

(Life and "Non-Can" alike) must be reinsured (i) *for 100%, or (ii) for exactly the same reduced percentage,* **utterly regardless of the fact** that the delay,† the necessity for such arithmetical *pro rata* distribution, and identic reinsurance of all policies (of widely different kinds and financial effect on a reinsuring company) would (*a*) cause *all* policyholders (including Non-Cans) to receive *less,* and (*b*) render it *impossible to rehabilitate* the business as a "going concern" (See pp. 60-63, *infra*).

Bettin's theory of the effect of the "contract" clause must be promptly rejected for the following reasons:

1. The Constitution of the United States does not confer upon the "Non-Can" *Active* Lives any vested right to compel a "forced sale" liquidation at the hands of the State (*Gibbes* v. *Zimmerman,* 290 U. S. 326, 332; *Dunn* v. *Love,* 172 Miss. 342, 354-8; *Doty* v. *Love,* 295 U. S. 64, 70; 2 Willoughby on Constitution [2d Ed.] §748; pp. 39-40, *supra*).

It is now well settled that in a business of a distinctly public nature or concern, every creditor takes his contract with the knowledge that, in the event of

†*Expense and loss resulting upon delay* is a major element in the case of an insolvent *insurance* company, different from the case of an ordinary commercial insolvency (where the creditors are, at most, only a few thousands, the amounts of whose claims are generally definite, and rarely require the determination or application of any "measure of damage"), because, in the case of an *insurance* company, (1) the number of its creditors runs into *hundreds of thousands* or *even millions,* and (2) the amounts of those numberless claims are dependent in *every instance* upon very varying "measures of damage," frequently disputed, and always requiring complicated actuarial computations.

the corporation's insolvency, the State may administer the assets, in a reasonable and practical manner, for the benefit of the creditors *as a whole,* even though some readjustments in strict legal rights are necessary, *provided that,* on the whole, the general corporate assets are devoted to the payment of corporate obligations without arbitrary favoritism or unjust preference; and that a small *minority* of creditors, by invoking the "contract" clause of the Federal Constitution, *cannot defeat* the State's administration of an insolvent estate under a Plan which produces real and substantial justice to all creditors (*Id.*).*

2. The Commissioner and the Lower Court [acting for the State] **decided against a forced sale** in liquidation, because (1) the Commissioner found that Old Company's Life, Accident and Health business was very profitable; that it had spent several million dollars in building up its agency organization, which, together with the Company's good will and "value as a going concern must be preserved" (R. 846-7, 850);

*See also *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 428-430, 434-445, and cases there cited; *Rent cases,* 256 U. S. 135, 256 U. S. 170, 258 U. S. 142; *Van Schaick* v. *Title & Mortgage Guarantee Co.,* 264 N. Y. 69; *Re National Surety Co.,* 268 N. Y. S. 88; s. c. 264 N. Y. 473; *Savings Investment & T. Co.* v. *Associated B. etc. Co.,* 122 N. J. Eq. 95; *Milner* v. *Gibson,* 249 Ky. 594; *State* v. *Title Guarantee & Trust Co.,* 168 Md. 376; *McConville* v. *Ft. Pierce Bank,* 101 Fla. 727; *Priest* v. *Whitney Loan & Trust Co.,* 219 Iowa, 1281; *In re Mechanics Trust Co.,* 119 N. J. Eq. 141; *McSweeney* v. *Equitable Trust Co.,* 16 N. J. Misc. 193; *Shepherd* v. *Mt. Vernon Trust Co.,* 269 N. Y. 234; *State* v. *Farm & Home Savings Assn.,* 338 Mo. 313, 90 S. W. (2d) 93; *Eskew* v. *Buckhannon Bank,* 115 W. Va. 579, 177 S. E. 433; *Timmons* v. *Peoples Trust Co.,* 114 W. Va. 618, 173 S. E. 79.

See also 80 A. L. R. 1487; 92 A. L. R. 1337; 96 A. L. R. 1445; 99 A. L. R. 1217; 104 A. L. R. 1203, for collection of cases.

and (2) the Trial Court, after seven weeks' hearing, adjudged:

> "That the properties, assets and estate of [Old Company] would be of substantially less value if they were sold separately . . . than if they were sold as a going concern; that [Old Company] had on July 22, 1936, *intangible assets* consisting of good will, agency organization and going concern values, which were and are of great value, to-wit: of *several million dollars;* that the said [Plan] is designed to accomplish the preservation and conservation of said intangible assets, and that the same do now exist and will hereafter continue to exist in the hands of the New Company. . . . That said rehabilitation and re-insurance agreement . . . is fair, just and equitable . . . . That adequate provision is made . . . for each and every class of policyholders, creditors and stockholders . . .; that neither said agreement nor the plan therein embodied discriminates unfairly or illegally in favor of any class of policyholders, creditors, stockholders or other persons . . . [It] does fairly and equitably protect and adjust the rights, obligations and liabilities of all persons concerned herein . . . is feasible, and that operations under said agreement are feasible" (R. 1385-1387).

The Supreme Court of California, after reciting those findings (R. 1519, 1523-4), pointed out that the several million dollars of intangible assets "would have been irreparably lost to the injury of all concerned" unless Old Company's business were promptly carried on (R. 1526); that "All these intangible assets would be lost if the Old Company were liquidated" (R. 1535) and that (R. 1539):

"All the dissenter [Bettin] is entitled to is the equivalent of what he would receive on liquidation"; that while "The record is also silent as to what the policyholders would have received in liquidation . . . the judgment roll discloses [that] under the approved plan **the assets are far in excess of what they would be on liquidation.** On these appeals, without the evidence before us, in support of the judgment, we must assume that evidence was introduced on these vital points and that such evidence demonstrated that **dissenters** under the plan **received as much or more,** as they would have received on liquidation. The order appealed from contains a recital that adequate provision is made in the plan for each class of policyholder. We must assume that such recital was amply supported by evidence" (R. 1539).

Bettin's proposed liquidating sale of Old Company's $223,000,000 assets,† (in order to convert them into cash for distribution among its creditors), would have caused (*a*) an enormous shrinkage in the values realized at such a sale however carefully conducted, (*b*) heavy expenses during the period of liquidation, (*c*) *destruction of millions of dollars* of value of good will and agency organization, (*d*) great delay in distribution on account of the necessity of determining the particular measure of damage applied to each policy, (*e*) liquidation expenses for the policyholders themselves in trying to establish their "measure of damage," and (*f*) irreparable injury to thousands of policyholders who had become *uninsurable* on account of their health, and would be unable, even when they

†P. 51, *supra.*

received payment of their claim for damages, to use it for the purchase of new insurance.*

In the absence of the evidence below (pp. 22, 40, *supra*) these obvious considerations justified the Commissioner and the California Courts in adopting a Rehabilitation Plan that (i) avoided these enormous financial losses, (ii) preserved intact the business as a "going concern" that it might continue to make profits for the policyholders in the future, and maintain unimpaired 100% insurance on 200,000 Life policyholders, as well as on many (number not shown) Non-Can *Disabled* Lives—at the price of only a *partial* immediate reduction in the reinsurance of Non-Can *Active* Lives (who might *never* become disabled), with (as the Court below decided) almost a certainty that they would ultimately receive 100%, if they should become disabled.

In the order of December 4 appealed from, and affirmed by the Supreme Court of California, it was specifically adjudged, on the basis of the seven weeks' evidence, that the Rehabilitation Plan afforded:

> "a feasible method of providing, within a reasonable time, **full restoration of the benefits under the non-cancellable income policies** of [Old Company] to the extent that the payment of such benefits is not initially assumed by the New Company . . . (R. 1387; OPINION R. 1540, 1544).

The California Courts have found—and there is no evidence to the contrary—that Bettin will receive *as*

Van Schaick v. *Title & Mtge. Guarantee Co.*, 264 N. Y. 69, 85, 93; *Shepherd* v. *Mt. Vernon Trust Co.*, 269 N. Y. 234, 240; *Dunn* v. *Love*, 172 Miss. 342; *Dickinson* v. *Saunders*, 129 Fed. 16, 17 (C. C. A. 1st); *Christensen* v. *Merchants & M. Bank*, 168 Miss. 43, 57; *McSweeney* v. *Equitable Trust Co.*, 16 N. J. Misc. 193, 198 Atl. 529, 532; *Cf. Doty* v. *Love*, 295 U. S. at p. 71.

much (or more) under the Plan as he would have received by liquidation (R. 1539). Therefore he has no cause to complain (*a*) that any right secured by the Federal Constitution has been denied him, or (*b*) that the obligation of his contract has been impaired (*Nagel* v. *Ghingher,* 166 Md. 231, 171 Atl. 65, 68; *Dunn* v. *Love,* 172 Miss. 342, 155 So. 331, 335, aff'd 295 U. S. 64).

3. We need not stop to inquire whether some other procedure for administering the affairs of the insolvent Old Company would have produced better results for Bettin than the Plan actually adopted, because the Record fails to show that such other procedure (if any) would have produced better results than the Plan adopted.

If Bettin bases his Federal claim upon the theory that the best possible Plan was not adopted, he ought to have included the evidence in the Record (OPINION R. 1517, 1540, 1543-4), so that the Supreme Court of California and this Court could determine for themselves whether the State had impaired the obligation of Bettin's policy by arbitrarily, fraudulently, or foolishly adopting a Plan, which gave him less than some other Plan (R. 1544).

The Supreme Court of California aptly said (R. 1541):

> "Some reference is made . . . to other plans of rehabilitation submitted to the trial court. The evidence as to the relative merits of the various plans is not before us. The record shows that the Commissioner and the trial court studied and gave consideration to all proposed plans, and found the one here approved to be the one best

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fitted to protect and preserve the rights of all concerned. Obviously this court, without any evidence before it, cannot now determine the relative merits of any of the submitted plans."

4. Whenever a life insurance company's assets fall even *one dollar below* the amount of its mathematically calculated Reserve, the company is insolvent; and, by the laws of all the States, its business must be stopped, and its affairs administered (in one form or another), by the State.*

Old Company was about $18,000,000 short in assets in order to be technically solvent.

Upon Old Company's insolvency, from what source could it obtain the necessary $18,000,000 additional?

No one would *give* it. The State could not furnish it (California Const. Art. 12, §13; R. 1543). The stockholders would not, and doubtless could not, put it up. Premiums on its existing business could not be increased (R. 1535). Borrowing was both utterly *impossible* (for no one would lend it), and equally *useless* (even if possible), because a loan would simultaneously increase Old Company's liabilities by the exact amount of the loan, and it would still be as insolvent as before.

Faced with the impossibility of securing the neces-

*Cf. 1 Couch on Insurance, §244 (a), pp. 520-526; Smith's "Notes on Life Insurance" (3rd Ed. 1876), p. 111 *et seq.;* McCall's "Review of Life Insurance" (1898), p. 15 *et seq.;* Dawson's "Elements of Life Insurance" (2d Ed.), p. 136; Moir's "Life Assurance Primer" (2d Ed.), p. 162 *et seq.;* Gephart's "Principles of Insurance," p. 184 *et seq.;* Hutcheson's "Some Facts in the Development of Life Insurance in the United States," pp. 14-17.

sary $18,000,000, the State could only do one of two things,* to-wit:

(1) **Liquidate** Old Company; convert all its assets into cash as best it could; and ultimately divide the cash (less expenses) among the 275,000 policies, *arithemetically proportional* to the amounts of their respective legal claims as the Courts should find them to be;

Or

(2) **Rehabilitate** the business of Old Company.

For adequate reasons, the Commissioner and the Court decided *not* to liquidate (pp. 11, 40, 42, 49-50, 53-55, *supra*). Bettin has no cause for complaint on that account (OPINION R. 1538).

The only alternative was to Rehabilitate (pp. 11, 59, *supra*).

Rehabilitation was impossible if the $18,000,000 had to be raised, **as there was no one to furnish it.** No one would pay $18,000,000 into the insolvent Old Company, even for its business as a whole.

Consequently, the State decided that the only possible rehabilitation was by an $18,000,000 **reduction in the liabilities.** That would (*a*) preserve millions of asset values for the benefit of the policyholders as a whole, and (*b*) give them, even with a *reduction* in their strict policy rights, much *more* than they could possibly receive through a forced sale liquidation.

The Plan actually adopted did not violate the Federal Constitution. It was, as the California Courts

*It was impossible for the Commissioner to remove the causes of Old Company's insolvency, *i. e.*, the insufficiency of the premiums charged for "Non-Can"; as such premiums on existing business could not be increased (OPINION, R. 1534-5).

decided, both feasible and just, would pay more to the policyholders than forced-sale-liquidation, or than any other Plan suggested, and it will probably pay even the "Non-Can" Active Lives 100% of their policy rights (R. 1387; OPINION R. 1540).

5. Justification for the Plan's apparent difference in treatment between (1) the 100% unconditional assumption of Life policies and "Non-Can" (Disabled Lives) and (2) only 20%–90% unconditional assumption of "Non-Can" (Active Lives), with a future conditional assumption for the remaining 80%–10%.

Old Company was insolvent. Obviously, everybody could not be paid in full. Claims had to be scaled down to permit the profitable part of the business to continue, so as to realize enough from the future profits to pay off what had been scaled down.

The Plan might have made the *necessary reduction* in Old Company's liabilities [which New Company would unconditionally assume] by either of two methods, viz.: a "horizontal" or a "vertical" reduction; but it is easily shown that the "horizontal" reduction would have been worse than Liquidation.

"HORIZONTAL" AND "VERTICAL" REDUCTIONS OF LIABILITIES—COMPARATIVE MERITS.

A. *"Horizontal" reduction in Liabilities and Benefits to be paid.* The Plan might have reduced Old Company's liabilities by $18,000,000 [which would have made Old Company technically solvent] or by $20,-

000,000 or more [which would have made Old Company solvent and with some provision for operating surplus or contingency funds], by (1) a 10%, or larger, "horizontal" reduction in all of its liabilities, except claims preferred by statute (e. g., Federal Tax claims) [liabilities including $170,000,000 Life policy reserves and $45,000,000 "Non-Can" (Active and Disabled) Reserves]; and, simultaneously, (2) a consequent *reduction in Benefits* which New Company would pay upon Maturity, Death and Disability.

A "horizontal" reduction would have fallen so heavily upon the *profitable* part of the business (*i. e.*, Life policies), that the following *destructive consequences* would have ensued (OPINION R. 1540):

The Agency Force (unable to sell *new* Life policies in a Company already in default on its outstanding Life policies) would disintegrate; the Company would lose the millions of dollars' value in its Agency Organization and good will; and it could not earn the otherwise certain future profits from its Life business.

Life policies always pay considerably *larger premiums* than are necessary to cover the cost of Life insurance; Participating policies receiving back such over-payments in the shape of annual dividends (*Rhine v. New York Life,* 248 App. Div. 120, 124-7; affirmed 273 N. Y. 1, 6-8, 12-13, 16-17). Life policyholders would quickly perceive that, despite their own *over-payments,* their insurance benefits were being greatly reduced, solely for the benefit of the "Non-Cans," who had grossly *under-paid* and who would continue to *under-pay* at the expense of the Life policies. Consequently, Life policyholders would simply abandon a

company, operating under what they would justly feel was such an *inequitable* Rehabilitation.

Dreaded "adverse selection" would instantly become rampant—persons smitten on one cheek will not turn the other, viz.: *Healthy* policyholders cash in their policies, and insure themselves in other companies; while *sick*, unhealthy or otherwise un-insurable policyholders keep up their policies, cause an abnormally high mortality, and geometrically increase the financial burden on the Company. This would soon cause a *second insolvency*, because no company can exist with *sick* policyholders predominating, as it must have the normal average of healthy policyholders in order to continue in business (*New York Life Ins. Co.* v. *Statham*, 93 U. S. 24, 32).

Upon such second insolvency, an even greater loss would befall all "Non-Can" policyholders, because "adverse selection" would produce a far more ruinous insolvency than the one already suffered.

Furthermore, by the "horizontal" method of reduction, all "Non-Can" *Disabled* Lives [who on July 22, 1936, were disabled] would suffer an extremely heavy "cut" in the future monthly Disability Income payments—all for the supposed benefit of "Non-Can" *Active* Lives who might *possibly* become *disabled* in the future. In rehabilitating an insolvent corporation, the State may fairly consider the effect on the future insuring public, of the Plan's comparative treatment of (*a*) *disabled* persons and (*b*) others who are active and may *never* become disabled, in connection with the future valuable goodwill of the New Company.

This destructive effect of any "horizontal" reduction [in *liabilities,* and, simultaneously, in the *benefits* under Life policies] upon any Rehabilitation Plan designed to preserve a "going concern" business and several million dollars' value of intangible assets, was so obvious that a "horizontal" reduction **was never suggested in any of the various proposed Rehabilitation Plans or objections by the fifty-odd Intervening Petitions and Responses** (pp. 12, 13, *supra*). On the contrary, every objecting policyholder, who offered an alternative suggestion in the court below, embodied in his suggestion a *different treatment* for "Non-Can" *Active* Lives from that given the other policyholders (R. 914, 1056, 1172, 1348, 1350). Such difference in treatment could not be brought about by any "horizontal" reduction, but only by a *"vertical"* reduction, in liabilities, now to be considered.

B. *"Vertical" reduction in Liabilities and Benefits re "Non-Can" Active Lives.* The only alternative was a "vertical" reduction varying according to (1) the character of the policies involved, and (2) the effect upon the success of the Plan.

Ordinary commercial insolvencies are generally caused by a shrinkage in assets, which must be spread uniformly over all unsecured claims with no special difficulty in their immediate expression in dollars and cents; *whereas,* Old Company's insolvency* was due,

*Old Company's "vertical" insolvency arose from the fact that, while the Life business (with 200,000 policyholders, $600,000,000 insurance in force, $170,000,000 Reserves and $5,500,000 Surplus accumulated from Life premium payments) was highly profitable and had paid annual dividends for many years, yet, at the same time, its "Non-Can" business (with about 50,000 policy-

not to a shrinkage in assets, but to an utterly *irregular increase in liabilities* as between two groups of policies —one profitable, the other extremely unprofitable— where the *amount* of the *provable* liabilities of the unprofitable policies would be ascertainable only after a lengthy judicial determination of the particular "measure of damage" applicable to each of the hundreds of thousands of claimants.

The Rehabilitation Plan, with a "vertical" reduction, had the great advantage and manifest justice of (*a*) preventing a shrinkage of assets and expense incident to liquidation; (*b*) saving millions of dollars in "going concern" and goodwill value; (*c*) preserving both Life insurance protection, and "Non-Can" *Disabled* Lives' Benefits intact; (*d*) continuing to earn substantial profits out of the profitable part of the business, to be later applied to the "Non-Can" *Active* Lives; and (*e*) placing the necessary immediate reduction in benefits upon those whose *under-payments had caused the insolvency* (R. 1535), instead of upon those whose *over-payments* had kept the Company afloat for many years (*Id.*)—all of which was provided for at the cheap price (*f*) of an immediate *graded reduction* in the benefits for "Non-Can" *Active* Lives who might *never* become disabled, *plus* the further assurance that the profits* of the business would be primarily devoted

holders, who had paid inadequate premiums, had built up no Surplus, but had created a $23,000,000 deficit) was not only insolvent, but with steadily increasing deficits ahead of it.

*To the possible suggestion that as Old Company made no profits of recent years, New Company cannot make profits, we respond (*a*) New Company has ceased to do the "Non-Can" business which brought about Old Company's disaster; and (*b*) the Rehabilitation Plan fully provided for the *entire* cost of the *reduced* benefits under "Non-Can" policies.

to restoring 100% Benefits to all the "Non-Can" *Active* Lives.

The necessary *reduction* was accomplished (1) by New Company re-insuring and assuming [only 20% to 90%] benefits under all "Non-Can" *Active* Lives, and (2) by the smaller Reserve required for such reduced benefits (R. 1413-1415, 1421, fol. 4263). The details of the reduction, which was with respect to "Non-Can" *Active* Lives only, are fully explained at pp. 17-19, 48, *supra;* and even that reduction was restored, in whole or in part, by New Company's agreement to devote all available profits toward 100% restoration of "Non-Can" *Active* Life reduced benefits (p. 17-18, *supra*).

The following considerations show the

INTRINSIC FAIRNESS OF REHABILITATION PLAN

In the first place, Old Company's stockholders get nothing. Their supposedly valuable ownership of Old Company was completely wiped out. Every dollar of Old Company's $223,000,000 of assets is devoted primarily and exclusively to pay Old Company's policyholders and other creditors [and New Company's new policyholders, who, of course, are fully paying their own way as they go, by their new premiums].

Therefore, we have only to consider whether the Rehabilitation Plan's *application* of the $223,000,000 of assets to Old Company's policyholders and creditors was an intrinsically *fair distribution* among the different kinds of claimants.

We submit:

(*a*) Speed in Rehabilitation was essential, because if the business were once interrupted for any material time, its value as a "going concern" and the millions of dollars of assets in Agency Organization and in "good will" would be lost forever to everybody. Consequently, any temporary subordination or postponement of strict legal rights was only on account of the greater advantage for all (including those whose rights were so subordinated or postponed)* [OPINION R. 1528-9, 1540].

(*b*) Life policyholders and Commercial Accident and Health policyholders always paid *more* than adequate premiums for their insurance protection; and any reduction in their benefits would have wrecked the Plan (p. 61, *supra*). In such an event, New Company would have been unable to secure the anticipated future earnings from the Non-Participating Life and Commercial Accident and Health policies. It is those earnings [and the Participating Life policies' surrender of a part of their own future annual dividends], which will be used to assist in restoring [100%] benefits to the "Non-Cans" (OPINION R. 1540).

(*c*) "Non-Can" *Disabled* Lives were 100% reinsured, solely to preserve the good will of the Company, because the sight of disabled policyholders, shorn of their monthly income for support, would undermine public confidence and prevent the Rehabilitation Plan from being a success.

*Nassau Smelting & Rfg. Wks. v. *Brightwood Bronze Co.*, 265 U. S. 269, 272; *Application by Van Schaick*, 239 App. Div. 490; 29 Ill. Law Rev. 599, 564.

Non-insurance floating debts were paid in full, because the amounts were small, past due, and precisely known. If left unpaid, they would injure the Company's credit, and might subject it to judgments and dismemberment.

(*d*) "Non-Can" policies *never* paid adequate premiums, and that was the primary cause of Old Company's disaster; and yet the Plan assured 100% benefits to "Non-Can" *Disabled* Lives, and a high percentage of benefits to "Non-Can" *Active* Lives, *plus* future profits to be derived from the profitable Life and Commercial Health and Accident policies (R. OPINION 1540).

(*e*) This graded reduction in re-insurance or assumption of "Non-Can" *Active* Life Benefits was in direct proportion to the adequacy of the premiums such Lives were paying; and the benefits are not only *all* that were paid for, but are *more* than were paid for, *i. e.*, to the extent of the future profits derived from the profitable business.

(*f*) After providing for the Legal Reserves required for, [and paid by], the Life, Health and Accident policies (out of which alone future profits could be made to fully restore "Non-Can" *Active* Life Benefits), all the remaining assets were allocated to the Accident Department.

This was principally for the benefit of "Non-Can" *Active* Lives, who thereby received *all assets* not absolutely needed to keep the business as a "going concern," by which millions of losses in liquidation were

avoided, and future profits would be earned, primarily for the benefit of "Non-Can" *Active* Lives.

Any further (unconditional) increase in "Non-Can" *Active* Life Benefits could only be had through a corresponding reduction in benefits for Life policyholders; but that would automatically destroy the Company's business (p. 61-63, *supra*); involve several million dollars' loss in intangible assets; and prevent the success of the Rehabilitation Plan—with the result that *all* policyholders would be *worse off* than before.

(*g*) The assets were of greater value under the Plan than in liquidation. A dissenting "Non-Can" *Active* Life will receive as much, or more than, and quite as rapidly as, in liquidation (R. 1386; 1524-5, 1535, 1539, 1540).

In view of the great uncertainty as to what a "Non-Can" *Active* Life's "measure of damage" would be, as ultimately to be determined by California Courts, the Plan gave to both *assenting* and *dissenting* "Non-Can" *Active* Lives, (1) *far more* than they could possibly receive under *one* asserted "measure of damage," (2) *about the same* as they would get under *another* asserted "measure of damage," and (3) *much less* than would be allowed under *another* "measure of damage"; but even if *allowed*, (2) and (3) could *never* have been *fully collected* from the insolvent Old Company or its Liquidator.

Unless Messrs. Neblett, Bettin, *et al.*, can affirmatively show that they have been "substantially injured in ultimate results," and have "in fact been *actually hurt* by the reorganization and the plan thereof," they

have "no right to complain whether upon *constitutional* or statutory or administrative grounds." (*Dunn* v. *Love,* 172 Miss. 342; affirmed in *Doty* v. *Love,* 295 U. S. 64.)

(*h*) If Bettin complains that a Life policy gets 100% assumption, while a Non-Can Active Life gets only 20% to 90% assumption, we reply (1) that 100% assumption of *Life* policies was essential to prevent liquidation, (2) that "Non-Can" Active Lives get 20% to 90% assumption (if they become disabled), with every probability that it will be 100% by the time they become disabled, and (3) that the great difference between a Life policy's claim for insurance fully paid for, and a "Non-Can" Active Life's *contingent* claim for a *possible* Disability Monthly Income *which has never been paid for,* justifies the difference in the relative amounts assumed by New Company.

If Bettin, as an Active Life, complains that a *Disabled* Life gets more than he [Bettin] will get if he becomes disabled *hereafter,* we reply that the *Disabled* Life's claim *had* matured, the amount was definitely known, and the Plan provided for its full [100%] assumption, *whereas,* Bettin has no matured claim, but only a *contingent possibility* that he *may* become disabled; and even if so, there is the *further contingency* as to whether, and how long, he will live to attain the successive monthly periods when Disability Income Payments become due. His contingency, *upon a contingency,* is of so remote and speculative a character that it was utterly impossible, consistently with any Rehabilitation Plan that would be workable, to assume

[100%] the *doubly contingent* liability to him; for, if so, New Company would, *ipso facto,* be as insolvent as the Old Company—and this is so because it was the huge liability to *Active* Lives, with inadequate premiums to support them, that caused Old Company's downfall (OPINION R. 1540).

(*i*) If Bettin complains of discrimination in that the "Non-Can" *consenter* gets *too much,* we reply that Bettin could have the "too much" for himself by merely consenting to the Plan.

If Bettin complains of discrimination, on the ground that the Life policy *dissenter* got better treatment than he, we say he errs, because they were given precisely the *same* treatment, to-wit: to file their claims before the Commissioner, have them allowed according to the "measure of damage" applicable to a breach of their respective contracts, and then to have such claims so ascertained paid *pro rata* out of the assets in the hands of the Commissioner as liquidator of the Old Company (OPINION R. 1539).

(j) In response to Mr. Neblett's suggestion [Supplemental Brief, p. 22] that the Life policies were given, in effect, a priority over "Non-Can" *Active* Lives, when they were all creditors alike with claims upon a common fund, we say that the priority or preference (if it can be so called) was made, because, otherwise it would have been impossible to carry on the established profitable business of the Company. Based upon "business necessity," preferred payments may sometimes be made, where otherwise "the probable

loss would exceed the required payments" (*Moore* v. *Donahoe*, 217 Fed. 177, 182 [C. C. A. 9th].*

The Supreme Court of California pointed out that if the evidence had been included in the Record, it might well be shown that "if *life* policies were reduced so as to be equalized with Non-Can policies, such reduction would dangerously impair the possibility of writing new life insurance, which would ultimately disorganize and destroy the agency organization"; that "such reduction in life policies would cause lapses and surrenders in such policies, particularly of those still insurable in other companies, leaving only undesirable risks accepting the reduction" ["adverse selection," p. 62, *supra*]; that "equalization would produce less for the Non-Can policyholders than the plan adopted"; and that, therefore, "the difference in treatment can be justified on the theory that such difference was necessary not only to preserve life policyholders' rights but also the rights of Non-Can policyholders" (R. 1540).

*Payment by a receiver of a penalty of doubtful validity assessed by prison authorities; allowed in order to avoid the cancellation of a valuable (but cancellable) contract for convict labor (*Asheville Cigar Co.* v. *Brown*, 100 Ga. 171); Allowance to stockholders (among whom the new management of the company was included) in a reorganization proceeding, in order to preserve the interest and efficiency of that management (*Re Donashoe's Inc.*, 19 F. S. 441); Allowance to stockholders in a reorganization in order to induce them to contribute new capital essential to the enterprise; *Kansas City Ry. Co.* v. *Cent. Union Tr. Co.*, 271 U. S. 445, 455; Swaine's "Reorganization of Corporations; Certain Developments of the Last Decade," 27 Col. L. Rev. 901, ——; "Some Legal Phases of Corporate Financing, etc.," pp. 135, 154-155; Cf. Payment in full of one creditor in a bankruptcy composition, in order to induce him to advance funds to supply the consideration of the composition (*Zavelo* v. *Reeves*, 227 U. S. 625).

In an appeal on the judgment roll the evidence is not brought before the Appellate Court (R. 1539, 1540, 1543); and the California rule is well settled that if any evidence could have been introduced which would have sustained the judgment or order appealed from, it will be presumed that such evidence was introduced. The facts thus presumed to have been established by competent evidence in the trial court constitute the facts found by the California Courts under their well established procedure.*

That certain priorities or preferences may be granted, in order that the very persons subordinated may ultimately obtain more than they otherwise would, has long been recognized in this Court† [*Cf.* OPINION R. 1540-1].

In the case at bar, the Supreme Court of California has recognized and adopted that very principle, which this Court (and all the inferior Federal Courts) has enforced for so many years in railroad and industrial foreclosures. A principle, which has this Court's authority for its adoption, certainly cannot be so arbitrary, capricious or unreasonable as to offend the "contract" clause of the Federal Constitution.

**Carpenter* v. *Pacific Mutual*, 10 Cal. (2d) 307, 325, 336, 339-341; *McAulay* v. *Truckee Ice Co.*, 79 Cal. 50; *Pacific Investment Co.* v. *Ross*, 131 Cal. 8, 10; *Antonelle* v. *City Hall Commrs.*, 92 Cal. 228, 229; *Shindelar* v. *Hadacheck*, 88 Cal. App. 319, 320; *Cummings* v. *Howard*, 63 Cal. 503, 504; 2 Cal. Juris 867-8, 876-7; and all recitals of fact in the Court's December 4th order must be accepted as true (*Keeling Collection Agency* v. *McKeever*, 209 Cal. 625, 628; *Anglo-California Trust Co.* v. *Oakland Rys.*, 193 Cal. 451, 461; *Gray* v. *Gray*, 185 Cal. 598-9; *Pavillion Ice Rink* v. *O'Brien*, 60 Cal. App. 185-6).

†*Miltenberger* v. *Logansport Ry. Co.*, 106 U. S. 286, 310-312; *St. Louis Trust Co.* v. *Riley*, 70 Fed. 32, 37; *Gregg* v. *Metropolitan Trust Co.*, 197 U. S. 183, 187; *Carbon Fuel Co.* v. *Chicago C. & L. R. Co.*, 202 Fed. 172, 174.

The Rehabilitation Plan allowed an apparent immediate preference to Life policies, in order (1) to prevent lapses and surrenders on a wholesale scale, which would have reduced the volume of *profitable old* business; and (2) to secure a desirable volume of *profitable new* business. From the large volume of such profitable new and old business, sufficient profits would be made to restore the reduced benefits to the Non-Can Active Lives (R. 1387). Any reduction in the benefits on Life policies causing wholesale lapses and surrenders, would have produced "adverse selection," which would soon have caused a far greater loss to the policyholders as a whole (including "Non-Can" Active Lives) than the amount of the preference.

That temporary preference was balanced, not only by preserving the value as a "going concern," but (1) by the entire equity in the New Company ($3,000,000 cash capital and surplus, agency organization, "good will," etc.), certain future profits, an amount equal to the legal reserve, and other special funds that were segregated for the benefit of the *dissenting* policyholders, and (2) by certain future profits being applied to restore 100% benefits to Non-Can Active Lives who *assented* to the Plan.

(k) Mr. Neblett insists [Supplemental Brief, p. 23] that the Supreme Court of California erred when it held that the dissenting policyholders *could* file their claims with a Liquidator; as [he insists] no Liquidator was appointed.

To that we respond that the Supreme Court of California decided that the Rehabilitation Plan contemplated that the Commissioner would be appointed

Liquidator, with whom dissenting policyholders were required to file their claims, and that the Liquidator "will receive, liquidate and pay all claims" out of the assets transferred to him (OPINION R. 1525-1526; 1542).*

Mr. Neblett constantly complains that the Supreme Court of California has *erroneously decided something.* Rightly or wrongly, it has decided that the *dissenting* policyholder does have a Liquidator with whom he can file his claim for damages, which the Liquidator must pay. If and when, on a proper record, Mr. Neblett shows that California has denied him the right to prove and collect his claim as a dissenting policyholder for damages, it will be time enough then to consider whether such action denied him "due process" of law; but, so far, the Supreme Court of California, instead of deciding what Mr. Neblett says it decided, *has actually decided precisely the opposite,* namely: that a Liquidator will be appointed with whom Mr. Neblett can file his claim, and by whom it must be paid (OPINION R. 1525).

*As the Record closes with the December 4, 1936, order, it does not show the appointment of the Liquidator. On January 18, 1937, the Insurance Commissioner was appointed Liquidator [Los Angeles Examiner, January 19, 1937, p. 3, columns 1-2; *Hutchins* v. *Pacific Mutual Life,* 20 F. Supp. 150, 151, Col. 2].

FEDERAL QUESTION INVOLVED

Does the "contract" clause of the Federal Constitution prohibit California's adoption of this Rehabilitation Plan, simply because (1) it made a "vertical" reduction in "Non-Can" *Active* Life Benefits, and (2) it did not give *identic* re-insurance to *every kind* of policy? The Rehabilitation Plan enabled an *insolvent* business to be *successfully rehabilitated* for the ultimate great benefit of its 275,000 policy-holders as a whole, by which most of them can maintain their insurance protection 100% in force; and the rest will receive certainly as much as, and probably a great deal more than, they could obtain from a forced liquidation.

This is not the case of one party to an ordinary commercial contract as against the other party, with which contract neither the public nor the general welfare is particularly concerned. Neither has California tried to relieve one party at the expense of the other party; nor to prevent any part of a debtor's assets from being subjected to the claims of his creditors.

This is a case where California has attempted a constructive Rehabilitation of one of its own insolvent corporations, for the sole purpose of conserving its assets and preserving its business for the benefit of all its creditors, policyholders and the general public (Cf. *Treigle* v. *Acme Homestead Assn.*, 297 U. S. 189, 197; *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315, 336-7).

The insolvent Pacific Mutual was a corporation of nation-wide activities engaged in the business of Life

Insurance which vitally affects the public interest—an enormous business where, in the United States alone, a comparatively few corporations have about *twenty-five billion dollars* of assets; have over 120,000,000 outstanding policies, insuring *sixty-five million policyholders* for over *one hundred billion dollars*; with an annual income of nearly *four billion dollars*; paying out each year nearly a *billion dollars* in Death Losses, and an additional *billion and a half dollars* to policyholders in the shape of dividends, endowments, surrender values, disability and double indemnity accident payments,—so that (including the insured policyholders and the beneficiaries who ultimately will receive the insurance) there are about *one hundred million people* in the United States who are insured in, and as beneficiaries will collect their insurance from, about sixty life insurance companies.

A business of that size and peculiar character, where a few corporations have long-range executory contracts with more than *two-thirds* of our total population, is so affected with a public interest and the general welfare, that it is universally recognized as subject to the closest kind of State inspection, supervision and control.* Its solvency is absolutely necessary and of the

German Alliance Ins. Co. v. Kansas, 233 U. S. 389; *O'Gorman & Young v. Hartf'd Ins. Co.*, 282 U. S. 251, 257; *Hartford Acc. Co. v. Nelson Co.*, 291 U. S. 352; *Life & Casualty Co. v. McCray*, 291 U. S. 566, 570; *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 246-7, and cases there cited; *Block v. Hirsh*, 256 U. S. 135, 155-7; *McConville v. Ft. Pierce Bank & Trust Co.*, 101 Fla. 727, 734; 1 Couch on Insurance, §§244-247, and 1937 Supplement (*Id.*); ANNOTATIONS 36 A. L. R., p. 1512; 72 A. L. R., p. 1173; 14 R. C. L., p. 857, §25 and Permanent Supplement "Insurance," §25; 32 C. J., p. 981, *et seq.* Gephart's Principles of Insurance, pp. 233-255. Cf. material collated in dissenting opinion of BRANDEIS, J., in *Liggett Co. v. Lee*, 288 U. S. 517, 548-567.

greatest public concern in order to safeguard its economic structure upon which the good of all depends. From 65,000,000 to 100,000,000 people are deeply concerned in the reasonable safety of their long-range insurance protection, because, for the many, payment will not be made until the far distant future,—even though by the inherent nature of life insurance itself, some sorely needed payments will be made to-morrow for those few, unexpectedly visited by death and accident.

When those many millions of policy contracts were made, there was impliedly read into each the reservation of the State power to safeguard the vital interests of its people, even though its emergency exercise of that power might sometimes necessarily result in slight modifications or abrogations (generally temporary) of pre-existing contractual obligations, where vital public interests would otherwise suffer;* and this is so, because all contracts are made subject to what is commonly called the police power, which is simply the power reserved to the States by the 10th Amendment.†

**Blaisdell case*, 290 U. S. at p. 435, 444; *Savings Invest't & T. Co.* v. *Associated B. Co.*, 122 N. J. Eq. 95; *North Jersey Title Ins. Co.*, 120 N. J. Eq. 148; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170, at p. 198, and cases there cited; *Van Schaick* v. *Title & Mortgage Guarantee Co.*, 264 N. Y. 69; *Priest* v. *Whitney Loan & Trust Co.*, 219 Iowa, 1281.

†*Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 434, 437-8, 440-2; *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170, 198; *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, at 249; *Manigault* v. *Springs*, 199 U. S. 473, 480; *In re Mechanics Trust Co.*, 119 N. J. Eq. 141, 149; *Savings Investment & T. Co.* v. *Associated B. Co.*, 122 N. J. Eq. 95, 103, and cases there cited; *North Jersey Title Ins. Co.*, 120 N. J. Eq. 148, 163; *Milner* v. *Gibson*, 249 Ky. 594, 606, and cases there cited; *Shepherd* v. *Mt. Vernon Trust Co.*, 269 N. Y. 234, 243; *Van Schaick* v. *Title & Mortgage Guarantee Co.*, 264 N. Y. 69, 83; *McSweeney* v. *Equitable Trust Co.*, 16 N. J. Misc. 1933, 198 Atl. 529, 532; *Dunn* v. *Love*, 172 Miss. 342.

It is well settled (*Blaisdell* case, 290 U. S. at 440-444), that the Federal "contract" clause does not prohibit those incidental and conditional restraints upon contract rights. This Court held that the State may, at times, prevent the immediate and literal enforcement of contractual obligations, where for the general good there must be some rational compromise between individual rights and public welfare.

For nine years [1929-1938], the United States has suffered an industrial, agricultural, financial and economic depression of such magnitude, that individuals, firms, corporations, municipalities, States and even the Federal Government itself, in order to protect their creditors and the general public as well as themselves, have secured legislative relief from their financial obligations, a few of which measures are mentioned in the margin.* Some of these Relief Acts have been held

*Bank Holiday March 6, 1933 (48 Stat. 1689-1691); Gold Hoarding Act and Bank Conservation Act, March 9, 1933 (48 Stat. 1) and Executive Orders thereunder; Gold Devaluation, May 12, 1933 (48 Stat. 52); Gold Clause Repeal, June 5, 1933 (48 Stat. 112); Gold Reserve Act of 1934 (48 Stat. 337); Gold Devaluation Proclamation, Jan. 31, 1934 (48 Stat. 1730-1); [*Norman* v. *B. & O. R. Co.*, 294 U. S. 240; *Nortz* v. *U. S.*, 294 U. S. 317; *Perry* v. *U. S.*, 294 U. S. 330; *Holyoke Power Co.* v. *Paper Co.*, 300 U. S. 324; *Smyth* v. *U. S.*, 302 U. S. 329]; Bankruptcy Act, §§75, 77, 77B; "Emergency Legislation in the Several States," March-June, 1933, American Life Convention Special Bulletin No. 262 and Supplement thereto; "Moratory Legislation," 46 Harvard Law Rev. 1061-85; "Constitutionality of Mortgage Relief Legislation," 47 Harvard Law Rev. 660-8; "Binding the Dissenter under State Reorganization Laws," 48 Harvard Law Rev. 1414-28; "State Control of Dissenting Minority Creditors in Municipal Debt Readjustment," 50 Harvard Law Rev. 946-956; "Impairment of Contracts," 35 Michigan Law Rev. 1003 note 13; "Mortgage Moratorium Held Unconstitutional because Emergency had Ended," 51 Harvard Law Rev. 1292; "Some Legal Phases of Bank Reorganizations," "The Law of Railroad Reorganization as Affecting Institutional Investors," and "Inter-State Aspects of the Liquidation of Insolvent Insurance Corporations" [Papers read before Association of Life Insurance Counsel, 1934-1935].

void,† and at least two so amended as to be held valid;‡ but most of them have been sustained on the ground of police power, emergency, previously unexercised reserve powers of the States, judicial change in the rigidity of the application of prohibitory restrictions, distinctions between changing the remedy and altering the substantive right, Bankruptcy power, etc.*

Regardless of whether or not a general economic "emergency" exists now (or at any time), if a very large insurance company becomes insolvent, whose liquidation would cause great loss to its policyholders and much damage to the public generally, a situation exists which calls for the State's exercise of its reserved power to prevent a destruction of values to the detriment of its people. (*Van Schaick* v. *Title & Mortgage Guarantee Co.*, 264 N. Y. 69, *per Lehman, J.*; *Shepherd* v. *Mt Vernon Trust Co.*, 269 N. Y. 234; *McSweeney* v. *Equitable Trust Co.*, 16 N. J. Misc. 193).

The application of the "contract" clause to the Pacific Mutual's Rehabilitation should be made with those considerations clearly in mind.‡

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†*W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426; *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56; *Louisville Bank* v. *Radford*, 295 U. S. 555; *Ashton* v. *Cameron County Dist.*, 298 U. S. 513.

‡*Wright* v. *Vinton Branch*, 300 U. S. 440; *Adair* v. *Bank of America*, 303 U. S. 350; *Wright* v. *Union Central Life*, 304 U. S. ——; *U. S.* v. *Bekins*, 304 U. S. 27.

**Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398; *U. S. Mortgage Co.* v. *Matthews*, 293 U. S. 232; *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648; *Gold Clause Cases*, 294 U. S. 240-381; *Doty* v. *Love*, 295 U. S. 64; *City Bank Co.* v. *Irving Trust Co.*, 299 U. S. 433; *Kuehner* v. *Irving Trust Co.*, 299 U. S. 445; *Holyoke Power Co.* v. *Paper Co.*, 300 U. S. 324; *Richmond Corp.* v. *Wachovia Bank*, 300 U. S. 124.

‡*Blaisdell case*, 290 U. S. 398, at p. 440; *Manigault* v. *Springs*, 199 U. S. 473, 480-1; *Union Dry Goods Co.* v. *Ga. P. S. Corp.*, 248 U. S. 372, 375-6; *M[illi]er* v. *Gibson*, 249 Ky. 594, 606; *State* v.

In the field of banking, insurance, railroads, utilities and other businesses which have long been recognized as of such a *quasi*-public nature as to justify State regulation, a great many reorganizations have taken place and have been upheld by the Courts.£

The Pacific Mutual Rehabilitation Plan provided for 100% reinsurance and payment of every kind of debt and obligation, *except only* "Non-Can" (*Active* Lives) which were given from 20% to 90% immediate reinsurance, with a postponed reinsurance of the balance, dependent upon the success of the Rehabilitation Plan and the profits that might be derived from

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Newark Milk Co., 118 N. J. Eq. 504, 516, 519; *State* v. *Farm & Home Savings Assn.*, 338 Mo. 313, 321; *McSweeney* v. *Equitable Trust Co.*, 16 N. J. Misc. 193; *Indiana* v. *Brand*, 303 U. S. 95, 108-9, and cases there cited; 2 Willoughby on the Constitution [2d Ed.], §762.

£*National Surety Co., In re*. 268 N. Y. S. 88; affirmed 264 N. Y. 473; *Van Schaick* v. *Title Mortgage & Guarantee Co.*, 264 N. Y. 69; *National Surety Corp.* v. *Nantz*, 262 Ky. 413; *Doty* v. *Love*, 295 U. S. 64; *McConville* v. *Ft. Pierce Bank & T. Co.*, 101 Fla. 727; *Jennings* v. *Fidelity & C. Trust Co.*, 240 Ky. 24; *Dorman* v. *Dell*, 245 Ky. 34; *Milner* v. *Gibson*, 249 Ky. 594; *Sweeny* v. *Jefferson Co. Bank's Reorg. Comm.*, 250 Ky. 187; *Becker* v. *Amos*, 105 Fla. 231; *Timmons* v. *People's Trust Co.*, 114 W. Va. 618; *Dunn* v. *Love*, 172 Miss. 342; *Eskew* v. *Buckhannon Bank*, 115 W. Va. 579; *Priest* v. *Whitney Loan & T. Co.*, 219 Iowa, 1281; *Bank of Murray* v. *Farmers' Bank*, 257 Ky. 251; *Nagel* v. *Ghingher*, 166 Md. 231; *Hoff* v. *First State Bank*, 174 Minn. 36; *Paul* v. *Farmers' & M. State Bank*, 187 Minn. 411; *Hagen* v. *First State Bank*, 180 Minn. 113; *Dorman* v. *Jones*, 257 Ky. 4; *Ex Parte Tennessee Valley Bank*, 231 Ala. 545, 166 So. 1; *Timmer* v. *Hardwick State Bank*, 194 Minn. 586; *Re Mechanics Trust Co.*, 119 N. J. Eq. 141; *Shepard* v. *Mt. Vernon Trust Co.* 269 N. Y. 234; *Corstvet* v. *Bank of Deerfield*, 220 Wis. 209, 263 N. W. 687; *State* v. *Title Guarantee & T. Co.*, 168 Md. 376; *North Jersey Title Ins. Co., In re*, 120 N. J. Eq. 148; *Savings Investment & T. Co.* v. *Associated B. & Co.*, 122 N. J. Eq. 95; *McSweeney* v. *Equitable Trust Co.*, 16 N. J. Misc. 193; *Christensen* v. *Merchants, Etc., Bank*, 168 Miss. 43; *State* v. *Farm & Home Savings Assn.*, 338 Mo. 313; *Cralle* v. *Louisville Title Company*, 244 Ky. 753.

its future operation. No policyholder was compelled* to consent to the Plan. If he dissented, he could establish the amount of his claim at law; and then the Commissioner, as Trustee for the dissenting policyholders, would pay the claim from the funds in the Commissioner's hands, consisting of the entire capital stock of the New Company [thus giving to the "Non-Can" (*Active* Lives) policyholders the entire equity in the New Company], the full Legal Reserve on all dissenting policies, as well as a certain proportion of the future earnings (OPINION R. 1541).

This Court must determine whether California's Rehabilitation Plan (1) falls on the side of those *many* cases in which Rehabilitation Plans have been sustained, or whether (2) it falls on the side of those *few* cases where Rehabilitation Plans have been held to violate the "contract" clause or other Constitutional prohibition (*Hessen Siak Shams* v. *Nebraska State Bank* (1931), 48 F. (2d) 894), distinguished in *Milner* v. *Gibson*, 249 Ky. 594, 603; *Ashton* v. *Cameron County Dist.*, 298 U. S. 513).

REVIEW OF RECENT AUTHORITIES UPHOLDING SIMILAR REHABILITATION PLANS.

The thirty-odd financial reorganization cases listed in the footnote on the preceding page 80, show how closely the Pacific Mutual Plan conforms to those which have been sustained by the Courts.

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*See p. 20 note, *supra*.

Pacific Mutual's Rehabilitation Plan did not try to compel a non-assenting policyholder to come in under the Plan, and it thereby avoided one difficulty in *Hessen Siak Shams* v. *Nebraska State Bank*, 48 Fed. (2d) 894. That case has been superseded by the *Blaisdell* case, 290 U. S. 398, and *Doty* v. *Love*, 295 U. S. 64.

A review of some of them shows that the same considerations which induced the Courts to sustain those Plans are abundantly present here.

In *Doty* v. *Love,* 295 U. S. 64, this Court sustained a Rehabilitation Plan. In 1930 a Mississippi Bank closed its doors; after two years of partial liquidation by the Superintendent of Banks, it re-opened under a 1932 Rehabilitation Statute [the closed bank will be called Old Bank; and, as re-opened, will be called New Bank].

The Plan, proposed by three fourths of the creditors and recommended by the Superintendent of Banks, was (after notice and hearing) approved by the Chancery Court. It provided substantially as follows:

(1) Certain old shareholders contributed $55,000 cash to the New Bank's capital, in consideration of their *release from $110,000 double liability.* The Old Bank's assets were turned over to the New Bank, respectively ear-marked (*i*) part to enable New Bank to pay 25% on the deposits, (*ii*) part to create a $45,000 surplus for the New Bank, and (*iii*) part into a pool to be managed and collected by the New Bank, and applied to pay the remaining 75% of deposits.

(2) New Bank paid in full all deposits of $5 or less; agreed to pay 25% of the deposits in instalments out of ear-marked assets (*i*); to apply $7,500 a year out of earnings to create a $45,000 surplus, and, as it did so, the assets (*ii*) were to be turned into the pool. All the balance of the assets (*iii*) went into the pool.

Of the 5,000 creditors affected, two appealed to the Supreme Court of the State, which affirmed the Plan (172 Miss. 342). On appeal, this Court held that the statute merely changed the method of liquidation, as the Old Bank's assets were devoted to the payment of its debts; and if the New Bank turned out to be unsuccessful, such an "outcome is an unlooked for incident of a method of administration conceived to be more efficient than present sale and distribution"; that the majority of the creditors were not imposing their will on a minority, as the Plan was only effective if the Superintendent of Banks and the Chancellor thoroughly considered the whole matter, and, upon the hearing, approved the Plan as "wise and just."

This Court aptly pointed out that what was done was "for the protection of existing creditors" in that "collections are made more promptly and readily by a going concern than by one in liquidation", and that "a live bank is much more efficient than a closed one in selling parcels of real estate or in carrying them while unsold at profitable rentals" (p. 71).

The Court said, in language particularly applicable to the Pacific Mutual's Rehabilitation, that the effect of the Plan was (p. 72):

> "to make it possible for the bank to be reopened with the result to the creditors of economies and other benefits that would otherwise be lost; . . . that in all probability the moneys thus obtained as contributions to capital [from the old shareholders in exchange for release from double liability] could not have been collected by judgment and execution, and that the *depositors* would be the *gainers* by the substituted form of payment."

With respect to that release of double liability and the payment of small depositors in full, this Court said (p. 73):

> "In last analysis, then, the appellant's grievance, if they have any, is this and nothing more, that there was error of judgment to their prejudice in the approval of the plan with the compromise of liability as one of its important features. . . . The testimony as to the probable results of liquidation without the aid of a reopened bank was not contradicted or discredited. But the result would not be changed if the record in that respect were different. Error of judgment in the compromise of liabilities is not a taking of property or an impairment of contract in derogation of the restraints of the Constitution of the United States. . . . The Chancellor found by his decree that it would be more economical to pay these accounts in full [$5 or less] than to incur the bookkeeping expenses incidental to a calculation of percentages whenever dividends were paid to others. The objecting creditors have not been damaged by that feature of the plan."

This Court recognized that where an insolvent company's assets were devoted entirely to the payment of its creditors, various adjustments were permissible, in the general interest of realizing the greatest amount possible by re-opening the company.

For example: The Mississippi Bank's depositors were completely prevented from subjecting the Bank's assets to the *pro rata* payment of their demand claims as depositors, because (i) the depositors could only get 25% of their deposits paid in 5% instalments as certain

assets were collected; (*ii*) $45,000 of assets could only be made available to pay depositors at the rate of $7,500 a year *if* earned by the New Bank, while (*iii*) the remaining 75% of deposits could only be collected as the New Bank might realize on the pool assets.

On the other hand, the claims of policyholders against Pacific Mutual were not *demand* claims [except for cash surrender values], but were for *future insurance protection;* all of which was 100% assumed by the perfectly solvent New Company, except as to "Non-Can" Active Lives which had no immediate claim (until Disability occurred); and yet, from the assets furnished to the Liquidator, "Non-Can" Active Lives were allowed to collect quite promptly the amount (when established at law) of their claims for damages for breach of contract, arising from the Old Company's insolvency (OPINION R. 1539-1540).

It is obvious that [while in both cases the assets of the insolvent company were, in a sense, removed from immediate seizure and subjection by their creditors], the Pacific Mutual Rehabilitation Plan was far less drastic than the Mississippi Bank Plan, from the standpoint of creditors promptly realizing on their demands.

In 1932-33, New York adopted a statute entitled "Rehabilitation, Liquidation, Conservation and Dissolution of Delinquent Insurers" the constitutionality of which has been repeatedly sustained, and under which many reorganizations have taken place (New York Ins. Law, §400, *et seq.*, p. 2, *supra*). The California Rehabilitation Provisions were copied substantially from that New York Law (OPINION R. 1532). The leading

cases are *Van Schaick* v. *National Surety Co.*, 239 App. Div. 490, affirmed 264 N. Y. 473, and *Van Schaick* v. *Title & Mortgage Guarantee Co.*, 264 N. Y. 69.

As the Pacific Mutual proceedings and Rehabilitation Plan followed that of the National Surety Co., it will be useful to review the New York cases with some care.

National Surety case. In April 1933, National Surety Co. (hereafter called Old Company) was insolvent, with potential liabilities of billions of dollars on guaranties, real estate and fidelity bonds. On April 29, the Superintendent of Insurance took possession of all its assets and adopted a Rehabilitation Plan, under which he organized (as here) a New Company with $4,000,000 cash capital and surplus, supplied out of the Old Company's assets.

The best assets were transferred to the New Company, which assumed [100%] all of the *profitable* part of the business. The stock of the New Company was (as here) held by the Superintendent of Insurance as trustee for the benefit of the creditors. The less desirable assets were held by the two subsidiary companies for the benefit of certain creditors.

The New Company assumed all losses occurring *after* May 1 on certain selected lines of preferred risks; but expressly declined to assume any losses occurring *prior* to May 1, 1933, or any liability on guaranties of mortgage bonds or of bank deposits in closed banks. Two subsidiary corporations were also organized to deal with those guaranties and certain "frozen assets."

The Rehabilitation plan was bitterly attacked; but it was sustained on the ground that the State Superintendent of Insurance and the Court had the right to Rehabilitate, rather than to Liquidate, a distressed insurance company, because (p. 96),

> "While it is true that one creditor or a few creditors may not be entirely satisfied, numerous other creditors and those dealing with the National Surety Company will most likely be saved millions of dollars by the method of rehabilitation proposed by the Superintendent of Insurance. The plan suggested seems feasible and to be for the benefit of all concerned, especially the creditors, . . . The method of safeguarding the rights of the creditors of the National Surety Company may have required the formation of a new corporation so that a very valuable good will and profitable business might be saved from ruin and thus eventually materially aid the creditors of the company."

The basis of the decision was that the State might place great responsibility upon the Superintendent of Insurance, and the Court; and that any abuse of that power could be checked by Appellate proceedings.

The result was that the great business of the National Surety Company was preserved as a "going concern"; and in 1936 the stock in the New Company was sold for over *ten millions of dollars* [$10,031,000], which went to pay off creditors (*In re National Surety Co.*, 248 App. Div. 111; affirmed 272 N. Y. 613).

The National Surety case was affirmed by the Court of Appeals (264 N. Y. 473), on the authority of *Van Schaick* v. *Title & Mortgage Guarantee Co.*, 264 N. Y. 69, where a Rehabilitation Plan was approved, under

which bonds, mortgages and other securities deposited with a trustee to secure a bond issue, were required to be turned over to the Superintendent of Insurance for administration in such a way, that the holders of the interests secured by the bonds were not allowed to enforce their rights in strict accordance with the letter of their contracts.

In an elaborate opinion by LEHMAN, J., based largely on the *Blaisdell* case, 290 U. S. 398, the law was upheld, in order that mortgagors might not be compelled promptly to meet the obligations of the mortgages on their property. The decision was based upon substantially the same reasons that actuated the California Courts in providing for 100% assumption of Life policies, a lesser assumption of "Non-Cans", and with a qualified assumption of the balance.

The Court pointed out that the free liquidation of mortgage bonds would result in wide-spread ruin to mortgagors and wide-spread damage to mortgagees; that the situation affected the vital interests and economic welfare of the community; that while each holder was entitled to enforce the mortgage, yet general foreclosure of the vast amounts of mortgages would ruin the owners, and

> "might so demoralize the real estate market that the value of all mortgages would be diminished and the credit of insurance companies and savings banks destroyed. In spite of all this, the owner of a single certificate in a series has a contractual right to insist upon the enforcement of every contractual obligation in which he is interested and to refuse to accede to any impairment of such

obligation or agreement. **The statute was intended to meet that situation."**

The Court held that the postponement of the enforcement of contractual obligations or their temporary impairment was permissible, because of the imemdiate danger to the economic welfare and vital interests of the community. That was a far more drastic interference with the rights of private contract than in the case at bar.

In *Thrower* v. *Kistler,* 14 F. Supp. 217, the National Surety plan of Rehabilitation was sustained, because, in that way, the value of the business as a "going concern" could be maintained. While the New Company could not assume the liabilities of the Old Company which had already matured, yet the New Company's stock was held for the benefit of the Old Company's creditors—just as here the $3,000,000 capital and surplus, and the "several millions of dollars" of agency organization, goodwill, etc., of New Pacific Mutual are held by the Commissioner for the benefit of all "Non-Can" (*Active* Lives) policyholders.

The respective assumptions of National Surety and Pacific Mutual, were largely the *converse* of each other. The New National Surety assumed all *future* losses, but *not* past losses; the New Pacific Mutual assumed all *past* and *future* losses, *except* only *future* "Non-Can" Active Lives. Otherwise, the two Plans were substantially the same. **In each case, certain kinds of policyholders were temporarily preferred over other policyholders; a preference which was balanced, however, by the total equity of the company being held for**

the benefit of those policies which were subordinated.

In *National Surety Co.* v. *Nantz,* 262 Ky. 413, the validity of the National Surety Rehabilitation was fully considered. It was held (1) that under the "full faith and credit" clause, the decision in New York was binding, and (2) that *intrinsically* the Rehabilitation was in line with similar rehabilitations in Kentucky, saying (p. 421);

> ". . . in liquidations of the affairs of extensive business interests, through and by legal proceedings the laws under which they are had and done will be liberally construed so as, if possible, to give effect to plans and methods of settlement that will ultimately result in the greatest benefit to creditors and other interested parties, even though usual remedies may be superseded or the enforcement of rights postponed, **and especially so when such departures are clearly shown to be beneficial rather than detrimental to the beneficiaries of the assets being administered; they are not to be interpreted as contravening the due process clause of either the Federal or State Constitutions but as affecting only procedural remedies and not substantive rights,"** citing *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, and *Doty* v. *Love,* 295 U. S. 64.

In *Milner* v. *Gibson,* 249 Ky. 594, a bank closed, and the Banking Commissioner took charge of all its assets. Subsequently a Reorganization Act was passed. Three-fourths of the depositors proposed a plan of Reorganization under which the re-opened bank agreed to pay in full all deposits less than $25; to pay 10% of

all deposits of over $25; and to pay the remainder in various instalments.

Dissenting depositors attacked the plan.

The plan was upheld largely upon the ground that there was nothing to show that ordinary liquidation would produce *more* for the depositors, in a shorter time, than provided for in the Reorganization plan. The basis of the decision was that, as banks fell within the police power, the State could provide for their reorganization even though it interfered incidentally with some contract rights.

In *Shepherd* v. *Mt. Vernon Trust Co.*, 269 N. Y. 234, a bank was closed during the Banking Holiday. Under a subsequent statute, it was re-opened, with the consent of a large majority of the depositors and stockholders, under a plan by which the general deposits were reduced by 45%. On the authority of the *Blaisdell* case, the statute and plan were sustained upon the ground that it was beneficial to all directly concerned, even though it did change, in some degree, the contractual obligations of the parties. The Court said:

> "The statute was intended to prevent a small minority from blocking a fair and equitable plan of reorganization which has received the consent of the majority of those interested and the approval of an informed court after a hearing. Undue insistence upon strict performance of a contractual obligation may be unfair to others and may be opposed to the general welfare."

In *State* v. *Title Guarantee & Trust Co.*, 168 Md. 376, a bank reorganization provided for the stockholders to pay in a certain amount in satisfaction of their statu-

tory liability and to be released from the balance; the depositors to get 30% in cash, and to get the remaining 70% in certificates of a holding company to liquidate certain assets of the failed bank. Any dissenting depositors or creditor might apply to the court "for the ascertainment of the fair liquidating value of his claim." The plan was upheld.

In *Priest* v. *Whitney Loan & Trust Co.*, 219 Iowa, 1281, a statutory reorganization plan was agreed to by depositors having over 75% of the deposits, under which they took new certificates of deposit in the reorganized bank for 50% of the original deposits, to be paid in instalments over three years; the remaining 50% to be paid from earnings, from some poorer assets of the bank as reorganized, and from amounts paid in by the stockholders. The Court held that this was not an impairment of the obligation of the depositors' demand contract with the bank; but that it was the exercise by the State of its police power over a business affected with the public interest. The case contains a most elaborate review of all the authorities on the subject. The Court said:

> "* * *. it has been universally held by courts of last resort everywhere that contracts made with institutions such as banks affected with a public interest are likewise inherently subject to the paramount power of the sovereign state, the people—the reserve power, sometimes called the police power, to enact, through the Legislature, additional remedial legislation in the public interest, affecting the supervision, regulation, control, or *liquidation* of banking corporations."

It is needless to review all the cases cited (p. 80 note, *supra*). They deal with banks, building and loan association, etc., which, under a variety of circumstances, were closed during the depression, generally during the March 1933 Bank Holiday declared by the President. Later, when State Rehabilitation Statutes were passed, the companies were reorganized under one of several different general plans, such as (*i*) "freezing" a part of the deposits for different periods of time, gradually to be paid out of assets as they were converted into cash; and (*ii*) the organization of a new company or the reorganized old company, by which the payment of a part of the old company's obligations was assumed, to be paid out of the old company's assets as liquidated; the balance of the obligations to be paid out of certain assets which the new company undertook, as agent, to liquidate for the benefit of creditors.

Those reorganizations were sustained, upon the general theory that such corporations were affected with the public interest; that the State had wide powers over their regulation while solvent, and even wider powers when they became *insolvent;* that the State could provide the conditions under which they should be liquidated or reorganized, including the right to postpone for the time being the immediate enforcement of contract rights—sometimes substituting stock for a percentage of the demand deposits; all upon the theory that the creditors, *as a whole,* would fare much better under a plan that would preserve the "going concern" value of the business, and provide a better liquidation of assets, than by a forced sale in liquidation.

The Courts held that great weight should be given to the determination of the State Banking Superintendent or Insurance Commissioner, and the judgment of the lower Court, when supported by a large majority of the creditors, as to the best course to pursue for the benefit of the creditors *as a whole;* and that incidental postponement of the right to subject the assets to the payment of creditors and some necessary priorities, were proper, [as exercised under the reserved power of the State to which every depositor or creditor was subject when he became a creditor]; and that such actions did not "impair the obligation of contracts" within the sense of the Federal Constitution.

The judgment of the Supreme Court of California should be affirmed.

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October 10, 1938.

[See Appendix for relevant California statutes]

APPENDIX

APPENDIX.

APPENDIX.

[Insurance Code of California (1935).
Article 14 Amended by Ch. 291 Stats. 1935]

Article 14. Proceedings in Cases of Insolvency and Delinquency.

1011. Upon the filing, by the commissioner, with the superior court in the county in which is located the principal office of such person in this State, of a verified application showing any of the following conditions to exist:

(a) That such person has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the commissioner or his deputy or examiner.

(b) That such person has neglected or refused to observe an order of the commissioner to make good within the time prescribed by law any deficiency in its capital if it is a stock corporation, or in its reserve if it is a mutual insurer.

(c) That such person, without first obtaining the consent in writing of the commissioner, has transferred, or attempted to transfer, substantially its entire property or business or, without such consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure substantially its entire property or business in or with the property or business of any other person.

(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or creditors, or to the public.

(e) That such person has violated its charter or any law of the State.

(f) That a certificate of authority of such person has been revoked under section 10711.

(g) That any officer of such person refuses to be examined under oath, touching its affairs.

(h) That any officer or attorney-in-fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person.

(i) That a domestic insurer does not comply with the requirements for the issuance to it of a certificate of authority, or that its certificate of authority has been revoked;

Or, upon the filing, by the commissioner, of a verified application accompanied by a certified copy of the commissioner's last report of examination of any person to whom the provisions of this article apply showing such person to be insolvent within the meaning of Article 13, Chapter 1, Part 2, Division 1 of this code, said court shall issue its order vesting title to all of the assets of said person, wheresoever situated, in the commissioner or his successors in office, in his official capacity as such, and directing the commissioner forthwith to take possession of all of its books, records, property, real and personal, and assets, and to conduct, as conservator, the business of said person, or so much thereof as to the commissioner may seem appropriate, and enjoining said person and its officers, directors, agents, servants and employees from the transaction of its business or disposition of its property until a further order of said court.

1012. Said order shall continue in force and effect until, on the application either of the commissioner or of such person, it shall, after a full hearing, appear to said court that the ground for said order directing the commissioner to take title and possession does not exist or has been removed and that said person can properly resume title and possession of its property and the conduct of its business.

1013. Whenever it appears to the commissioner that any of the conditions set forth in section 1011 exist or that irreparable loss and injury to the property and business of a person specified in section 1010 has occurred or may occur unless the commissioner so act immediately, the commissioner, without notice and before applying to the court for any order, forthwith shall take possession of the property, business, books, records and accounts of such person, and of the offices and premises occupied by it for the transaction of its business, and retain possession subject to the order of the court. Any person having possession of and refusing to deliver any of the books, records or assets of a person against whom a seizure order has been issued by the commissioner, shall be guilty of a misdemeanor and punishable by fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both such fine and imprisonment.

1014. Whenever the commissioner makes any seizure as provided in section 1013, it shall, on the demand of the commissioner, be the duty of the sheriff of any county of

this State, and of the police department of any municipal corporation therein, to furnish him with such deputies, patrolmen or officers as may be necessary to assist the commissioner in making and enforcing any such seizure.

1015. Immediately after such seizure, the commissioner shall institute a proceeding as provided for in section 1011 and thereafter shall proceed in accordance with the provisions of this article.

1016. If at any time after the issuance of an order under section 1011 it shall appear to the commissioner that further efforts to proceed under said section would be futile, he may apply to the court for an order to liquidate and wind up the business of said person. Upon a full hearing of such application, the court may make an order directing the winding up and liquidation of the business of such person by the commissioner, as liquidator. The title to all property and assets of such person, vested in the commissioner under section 1011, shall remain in the commissioner, as liquidator, for the purpose of carrying out the order to liquidate and wind up the business of such person.

1019. Upon the issuance of an order of liquidation under section 1016, the rights and liabilities of any such person and of creditors, policyholders, shareholders and members, and all other persons interested in its assets shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order in the office of the clerk of the county wherein the application was made.

1021. Upon the making of an order to liquidate the business of such person, the commissioner shall cause to be published notice to its policyholders, creditors, shareholders, and all other persons interested in its assets. Such notice shall require claimants to file their claims with the commissioner, together with proper proofs thereof, within six months after the date of first publication of such notice, in the manner specified in this article.

1024. Unless such claim is filed in the manner and within the time provided in section 1021, it shall not be entitled to filing or allowance, and no action may be maintained thereon. In the liquidation, pursuant to the provisions of this article, of any domestic insurer which has issued policies insuring the lives of persons, the commissioner shall, within thirty days after the last day set for the filing of claims, make a list of the persons who have not filed proofs of claim with him and to whom, according to the books of said insurer, there are amounts owing under

such policies, and he shall set opposite the name of each person the amount so owing to such person. Each person whose name shall appear upon said list shall be deemed to have duly filed, prior to the last day set for the filing of claims, a claim for the amount set opposite his name on said list.

1025. Claims founded upon unliquidated or undetermined demands must be filed within the time limit provided in this article for the filing of claims, but claims founded upon such demands shall not share in any distribution to creditors of a person proceeded against under section 1016 until such claims have been definitely determined, proved and allowed. Thereafter, such claims shall share ratably with other claims of the same class in all subsequent distributions.

An unliquidated or undetermined claim or demand within the meaning of this article shall be deemed to be any such claim or demand upon which a right of action has accrued at the date of the order of liquidation or accrues within the time limit provided in this article for the filing of claims, and upon which the liability has not been determined or the amount thereof liquidated; provided, however, that claims founded upon judicial surety bonds and undertakings securing unmatured obligations shall be deemed to be unliquidated and undetermined demands within the meaning of this section.

1043. In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of such person, or enter into rehabilitation agreements. Such rehabilitation or reinsurance agreements shall provide that, subsequent to the date thereof and for such period of time as the commissioner may determine, no investment or reinvestment of the assets of the person rehabilitated or reinsured shall be made without first obtaining the written approval of the commissioner.

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Supreme Court of the United States

No. 21—October Term, 1938

Wm. H. Neblett, Vernon Bettin, William George Dickinson and Alfred F. MacDonald, *Petitioners*,

v.

Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, et al., *Respondents*.

PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE.

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December 23, 1938.
Washington, D. C.

Press of Byron S. Adams, Washington, D. C.

INDEX.

Page

Statement of Points Urged for a Rehearing 1

I. The probability of a public emergency precipitated by relaxation of the constitutional guaranty of due process 2

II. Due process is denied in a special proceeding brought by a state, unless the statute authorizing it requires notice. Notice given by direction of the court, when not required by the statute, does not give the court jurisdiction to act 11

III. The alternative remedy given non-assenters must be definite and absolute. It cannot be left to discretion 15

Appendix 21

TABLE OF AUTHORITIES CITED.

Cases.

Carpenter v. Pac. Mutual, 10 Cal. (2) 307 3
Coe v. Armour Fertilizer Co., 237 U. S. 413 ..4, 11, 13, 16, 19
Coombes v. Getz, 285 U. S. 434 9
East Tenn. V. & G. Ry. v. So. Tel. Co., 112 U. S. 306, 310 14
First Nat. Bank of Cincinnati v. Flershem, 290 U. S. 504 .....8, 15
Gibbs v. Zimmerman, 290 U. S. 326 16
Home Building & Loan Association v. Blaisdell, 290 U. S. 398 7
Lindsay Strathmore Irrigation District v. Superior Court, 182 Cal. 315 .....3, 14
Louisville & N. Ry. Co. v. Central Stockyards Co., 212 U. S. 132, 144 .....16, 18
Lovell v. St. Louis Mut. Life Ins. Co., 111 U. S. 264, 273 15

Page

Marin M. W. Dist. v. North Coast Water Co., 178 Cal. 324, 328 14
Mitchell v. Maurer, 293 U. S. 237 14
Morgan v. U. S., 304 U. S. 1 ..... 4, 18
Murray v. Am. Surety Co. (C. C. A. 9), 70 Fed. 341, 346 14
Nat. Surety Co. v. Coriell, 289 U. S. 426 ..... 8, 15
Nor. Pacific Ry. v. Minn., 208 U. S. 583, 591 16
Riverside Cotton Mills v. Menefee, 237 U. S. 189, 193 ..... 4, 11, 18
Roller v. Holly, 176 U. S. 398, 409 ..... 13, 18
Scott v. McNeal, 54 U. S. 34 2
Shapiro v. Wilgus, 287 U. S. 348 ..... 8, 15
Simon v. Southern Ry. Co., 236 U. S. 115 16
Smith v. Westerfield, 88 Cal. 374, 378 14
Windsor v. McVeigh, 93 U. S. 274 ..... 4, 11, 12

Supreme Court of the United States

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PETITION FOR REHEARING AND MOTION FOR STAY OF MANDATE.

STATEMENT OF POINTS URGED FOR A REHEARING.

We respectfully pray that a rehearing be granted on the decision rendered by this Court on December 5, 1938, affirming a decision of the Supreme Court of California, which approved an order of rehabilitation or reorganization of the Pacific Mutual Life Insurance Company of California, a domestic insurer. We present the following points as reasons for the rehearing:

A great nation-wide public emergency is likely to arise because of the relaxation by the decision of the principles, heretofore rigidly adhered to, of due process under the 14th Amendment and of the impairment of the obligation of contract under Article 1, Section 10, of the Federal Constitu-

tion, as applied in the opinion to insurance insolvency proceedings, by a state through a special act of its legislature, making it possible for all insurance companies to adjust their liabilities to their reserves to the great detriment of the public, 65,000,000 of whom are policyholders in the several life insurance companies doing business in the United States;

The decision permits title to be forfeited to the reserves of an insolvent insurance company, in which the policyholders have a contractual interest, and the contracts of all policyholders to be impaired, in a special proceedings, had under an act of the state legislature, which does not provide for notice or hearing; and the commissioner to rehabilitate or reorganize the company under the statute which does not require notice to be given to any one whose contracts or other property rights are affected by the proceedings;

The decision establishes the principle that those who do not assent to the plan are accorded due process by an alternative remedy, which is postponed to an indefinite date in the future, and is never available to a dissenter from the plan unless granted by the insurance commissioner and the trial court, upon whose discretions, exercised in sequence, the remedy is absolutely dependent. To one group of policyholders the full remedy is also contingent upon the discretion of the board of directors of the reorganized company.

I.

The probability of a public emergency precipitated by relaxation of the constitutional guaranty of due process.

> "No judgment of a court is due process of law, if rendered without jurisdiction in the Court, or without notice to the party." *Scott* v. *McNeal*, 154 U. S. 34.

Brought on, however, we believe, by our imperfect presentation of the case in oral argument, we feel that this Court has erred in holding that the due process and contract

clauses of the Federal Constitution were not violated by what was done in the reorganization of the Pacific Mutual Life Insurance Company of California. The effect of the decision is that a state may forfeit title, without notice or hearing, to the assets of an insurance company, and thereafter deal with those assets upon the whim or fancy of its insurance commissioner.

Sixty-five million policy holders, owning 125,000,000 policies in life insurance companies in the United States, can no longer look to the Federal Constitution for protection of their life savings, invested in $110,000,000,000 in life insurance contracts, said to be secured by $25,000,000,000 in assets or reserves, built up mostly from the premiums they have paid to their insurers. They must now rely on the uncontrolled discretion of a short term political appointee of the state where the insurance company, with which they have contracted, was organized.

All the insurance commissioner needs to do now, in order to take title to the properties and assets of an insurance company, in which the reserves for the protection of the policyholders are invested, is a law of the state where the company was organized, giving him authority to file an application, reciting that he has found in secret that the company is deficient in some one of the cases enumerated in the statute, and the court, without notice or hearing, "must" give him title to all the assets and properties of the company in "fee simple" to deal with as he pleases.[1]

Even if the commissioner takes the case before a judge, whose orders are void for lack of jurisdiction in him to make them,[2] and through such void orders, completely reorganizes the company, the void orders of reorganization may be cured by subsequent order, again made without

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[1] Cal. I. C., §§ 4 & 1011; *Carpenter* v. *Pac. Mutual*, 10 Cal. (2) 307.

[2] Cal. Code of Civil Procedure, § 170; *Lindsay-Strathmore Irrigation District* v. *Superior Court*, 182 Cal. 315.

notice or hearing,[3] because such things are, in this decision, held to be matters of state law.[4]

Granting that the state legislature may vest an insurance commissioner with power to forfeit title to himself in the assets or reserves of an insurance company,[5] the legislature must, in conferring upon him that great power, require him, before he can make a constitutional exercise of it, to give notice to the policyholders and accord them a hearing in keeping with accepted judicial standards.[6] The Federal Constitution requires a state, whether acting through its courts or semi-judicial bodies of its creation, to provide for notice and hearing to all persons affected by their orders or due process under the 14th Amendment to the Federal Constitution will be denied.

Keeping in mind that the California Insurance Code makes no provision for notice or hearing to policyholders, stockholders, creditors, or others interested in an insurance company, as a prelude to a declaration of insolvency and forfeiture of title to the insurance commissioner, no notice was given or hearing had on August 11, when the void reorganization of Pacific Mutual was confirmed and the commissioner reappointed conservator and re-vested with title to the assets and properties of the old company. Heretofore, this Court has rigidly required that state legislation must provide for notice; it must be given; and the party to whom it is given must be accorded a hearing. Where any one of these three essentials has been missing, it has always been held that due process had been denied.[7]

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[3] 10 Cal. (2) 307.

[4] Opinion P. 3.

[5] Reserves of an insolvent insurance company are what is left of the assets after they fall below the level of legal reserve requirements.

[6] *Morgan* v. *U. S.*, 304 U. S. 1.

[7] *Windsor* v. *McVeigh*, 93 U. S. 274; *Coe* v. *Armour Fertilizer Co.*, 273 U. S. 413; *Riverside Cotton Mills* v. *Menefee*, 237 U. S. 189.

If this decision stands, all life insurance companies in the United States may shift the burden of their mistakes of management to any unfavored group of policyholders by arbitrary reduction of the benefits of their policies to fit, in the discretion of the insurance commissioner, the size of the premiums fixed by the management in policy contracts. The serious public effects of the decision are aggravated by the comparative condition of the Pacific Mutual Life Insurance Company of California and that of all other life insurance companies in the country.

It is declared in the briefs of the respondents and was stated in oral argument by them that Pacific Mutual had $223,000,000 in assets and $600,000,000 in insurance, while all of the life insurance companies in the United States have $25,000,000,000 in assets and $110,000,000,000 in outstanding insurance. The ratio of the Pacific Mutual's reserves to outstanding insurance was 39 per cent and that of all the life insurance companies taken together is only 23 per cent.

With its ratio of reserves to outstanding insurance 70 per cent higher than that of the average company throughout the United States, no reason appears for the reorganization of the Pacific Mutual Life Insurance Company, unless it was done to perpetuate control of the assets of the old company in the small group that passed from the management of it to that of the new, or as a trial horse to establish a precedent for the liquidation of all insurance companies throughout the United States, which must speedily follow if the condition of the Pacific Mutual compared with the other companies means anything. If it was technically insolvent with its assets or reserves 70 per cent higher than the average, then all the other insurance companies in this country are hopelessly insolvent.

The actual condition of insurance companies in this country is worse than the picture painted by these figures. Every day we read in the news about the sad plight of the railroads. It is estimated from press reports that there

are $19,000,000,000 in railroad securities outstanding. It is no secret that the insurance companies have many if not most of them, which they carry at cost—a value several times greater than those securities now have. The earning statements of the railroad companies show no possibility of a recovery for their securities, but rather the probability of a continued decline. It may not be long now until every insurance company in the United States, using this decision as a criterion, will reorganize by shifting the burden of the mistakes of management in the purchase and retention of these railroad securities and in fixing premium rates to the 65,000,000 policy holders who have their life savings invested in insurance.

If there is no protection in the Federal Constitution for the Pacific Mutual policy holders, one group of whom saw the benefits of their policies reduced to 20 per cent of their face value, if they kept up the same premium rate, then there is nothing to keep every insurance company in the United States from taking advantage of the decision of this Court and scale down their outstanding policies to any arbitrary figure that may be selected. The petitioners and the other similarly situated policyholders in the Pacific Mutual expect that, following this decision, other companies in which they own policies will cut down the benefits to any arbitrary figure that may suit the fancy of the managements of the companies and the insurance commissioners of the states in which the companies were organized.

Insurance, which has always been thought to be the greatest security that a man could have against poverty in old age and as protection for his family after death has, by this decision, become one of the most uncertain of all investments, because the contracts of the policyholders are no longer protected by the Federal Constitution. Full control of the life savings of the great majority of the people in the United States has now passed to the states in which the insurance companies, they are insured in, were organ-

ized, freed of the protecting influence of the Federal Constitution.

Most of the states already have insurance laws somewhat similar to that of California. If not, it is possible that no more difficulty will be met in those states, which wish to adopt such a law, than was experienced in California, in putting the Insurance Code through the legislature of that state. Everything in the insolvency provisions of the California Insurance Code, as well as what has been done since its passage, indicates that the act was special legislation designed to give those in control of the Pacific Mutual the opportunity to shake out the policyholders who held contracts less favorable to the company and to fortify certain officers in control of the management of the $223,000,000 in assets, which carries with it great power and prestige to those to whom the state court has committed its care through the reorganization.

No emergency was declared in the statute or found by the state court to exist. Heretofore, not only might a contract not be changed, but the remedy could not be deferred unless a general emergency furnished an occasion for it.[8]

The small group, headed by Alexander Kemp, President, and Asa V. Call, Executive Vice President and General Counsel for the old company, became the dominant spirits in it just before its insolvency and, with the help of the insurance commissioner, cemented themselves in the same relative positions in the new company.

At the last session of the legislature, § 1037 of the California Insurance Code was amended so as to permit the insurance commissioner to transfer to a voting trust for twenty-one years the stock of the new company, all of which he had issued to himself in the reorganization. Shortly after that voting trust was set up and began working, Commissioner Carpenter resigned.

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[8] *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398.

Asa V. Call, General Counsel and Executive Vice President of the old and the new companies, who, with his wife, was a large stockholder in the company, sold their stock early in 1936, after he and Kemp had determined to reorganize the company under the new law. They were at that time working in conjunction with the Commissioner of Insurance to make the report which formed the basis of the insolvency proceedings.

After that, Kemp, as President, and Call, as Vice President, sent out a statement to the 300,000 policyholders of the company, which was then, so they said in that statement, put out only four months prior to the reorganization, "'was emminently solvent.'"[*] These are the two men, who are now in control of and hold the same offices in the new company that they held in the old.

It was Kemp, as President of the old company, and Call and Harriman, as its attorneys, without any authorization of the board of directors, who appeared for the old company on July 22 and consented to the appointment of the Insurance Commissioner, first as conservator and then as liquidator.[1] Kemp, as President, and Harriman, as Secretary, joined with the Insurance Commissioner in the deed conveying all of the assets and properties of the old company to the new.[2]

These labors in bringing about the extinction of the old company being complete, the same officers appeared thereafter for the new company. Kemp, as President of the new company, on the same day signed and swore to the petition for an order directed to the policyholders of the old company to appear and show cause on August 12 why the plan and conveyance should not be approved.

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[*] Testimony before California Legislative Committee, Oct. 1937.

[1] R. 33, 48.

[2] R. 190; see *First Nat. Bank of Cincinnati* v. *Flershem*, 290 U. S. 504; *Shapiro* v. *Wilgus*, 287 U. S. 348; *Nat. Surety Co.* v. *Coriell*, 289 U. S. 426.

Asa V. Call showed up on this petition as attorney for the new company.[3] Call, at the same time as vice president of the new company, and Harriman as its secretary, joined with the Insurance Commissioner in executing the plan of rehabilitation.[4]

No resolution of the board of directors of either company was presented or filed with the court as authority for these acts of the officers of the old and of the new companies appearing in these inconsistent but self-interested positions. They could not kill the old corporation in that manner.[5]

The business of practically every company engaged in insurance is nationwide. With the curb of the due process and impairment of contract clauses of the Federal Constitution lifted, we will see all the confusion and inequities that will arise from the administration of insolvent insurance companies through the commissioners and the courts of forty-eight different states. Unless the rehearing is granted and the decision of the Supreme Court of California reversed, immediate and rigid Federal regulation is inevitable to meet the great emergency that may soon come.

Trust funds committed to corporations continue to be dealt with as if they belong to the managements. What happened in the reorganization of the Pacific Mutual proves that life insurance is no exception. That great company was declared to be insolvent, and public confidence in the reorganized company destroyed, because the premiums charged for non-cancellable accident and health policies were said to be inadequate to maintain the reserves required by law.[6] It is common knowledge that premiums charged by the Pacific Mutual and by companies generally on life and accident insurance are way too high in proportion to the benefits received.

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[3] R. 150, 151.

[4] R. 225

[5] *Coombes* v. *Getz*, 285 U. S. 434.

[6] R. 3.

The deficiency of $18,000,000 in reserves found by the Commissioner to have existed as of December 31, 1935, when he filed his application on July 22, 1936, could have been speedily remedied if the company had been allowed to continue business. The respondents admit that, in the seven months intervening between December 31, 1935, and July 22, 1936, the company's assets increased by $7,000,000, reducing the alleged deficit to $11,000,000. If the good will and value of agency force found by the court to be worth many millions of dollars had not been destroyed by the reorganization, it would have more than wiped out the comparatively small remaining deficit of $11,000,000.

Axioms in the insurance field are that the continued solvency of a life insurance company is dependent upon new business and that ability to get new business is ruined by a receivership or reorganization with the consequent detriment to the then policyholders.

It is evident that Pacific Mutual was never insolvent. If it had been let alone, it would have, in another eleven months, without taking into account the value of good will and agency force, judging by the increase in reserves of $7,000,000 in the seven months prior to the reorganization, completely wiped out the claimed deficit. But the record shows that the ambitions of the President and the Executive Vice President and General Counsel to get the exclusive control of the great business outweighed their responsibility to the policyholders.

II.

Due process is denied in a special proceeding brought by a state, unless the statute authorizing it requires notice. Notice given by direction of the court, when not required by the statute, does not give the court jurisdiction to act.

The void orders of July 22 and 23 have the additional infirmity of being made without notice or hearing. The order of August 11, upon which the whole proceedings hinge for their claimed validity was also made without notice or hearing, and is void for those reasons.

The state court evidently acted upon the theory that, since the Insurance Code required no notice, none was necessary. Section 1038 of the Insurance Code, requiring service of the application upon the company, was not observed. If it had been, it would have been immaterial, for such service is not required as a condition precedent to the order of conservation and of vesting title.

The court must act immediately upon the filing of the application. It must appoint the commissioner conservator and vest the title in him. If the personal service mentioned in § 1038 is not made, the court, under the mandatory provisions of §§ 1011 & 4, must, upon the filing of the application, give judgment. Even if personal service had been made on the company, it would have been ineffectual because §§ 1011 & 4 of the Insurance Code do not permit a hearing. When a court proceeds to judgment under a statute which provides for service but does not accord a hearing, due process is denied and the statute is unconstitutional.[1]

The state court held that everything done by the court on July 22 and 23 was void. However, it said that what was done then amounted to a seizure by the Insurance Commissioner of the properties and assets of the company

[1] *Windsor* v. *McVeigh*, 93 U. S. 274, 278; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Riverside Cotton Mills* v. *Menefee*, 237 U. S. 189.

under § 1013 of the Insurance Code. Section 1015 of the Code requires the commissioner, after summary seizure, to proceed immediately in the courts under §1011. This the Supreme Court of the State held that the Commissioner did. But all he did thereafter was done under the Code, which was unconstitutional because it required no notice and none was given.

If we assume that the seizure by the Commissioner and the proceedings begun when he filed his application gave the court jurisdiction of the properties and assets of the company, no jurisdiction was conferred on the court to go any further without notice and a hearing. The Insurance Code, §§ 1011 & 4, instead of requiring notice and hearing as a condition to appointing the commissioner as conservator and vesting title in him, makes it mandatory upon the court to issue the orders "upon filing the application."[2]

There came out of the abortive proceedings of July 22 and 23 a notice and order to show cause directed to all policyholders, stockholders, creditors and others interested, requiring them to appear on August 12 at 10 o'clock a. m. and show cause why the plan, transfer of assets and reorganization already completed should not be approved. This

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[2] "The jurisdiction acquired by the court by seizure of the res was not to condemn the property without further proceedings. * * * A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit in rem only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed, before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges.

Windsor v. *McVeigh*, 93 U. S. 274, 279.

notice was not required by the statute, so the court had no jurisdiction to give it. Where a notice is not required by a special statute, though given, the Constitutional requirement of due process is not accorded.[3]

On August 11, the Commissioner, having become apprised of the void character of the reorganization he had procured from the court, he again without notice to anyone presented his application to the court.[4] No better evidence of our contention that the proceedings were collusive from the beginning could be had than that of the Commissioner appearing in court a day ahead of the time he had noticed a hearing and then having his acts approved, without giving anyone interested an opportunity to object. That action was not only a denial of due process; it was positively unfair within the meaning of *Morgan* v. *U. S.*, 304 U. S. 1. It was not incumbent upon a policyholder to move the court to set aside the order of August 11. "That would be a matter of discretion—a contingency he was not bound to contemplate."[4a]

The order of August 11, approving what had already been done and reappointing the commissioner as conservator and vesting title in him to all the assets of the old company in "fee simple", denied due process because it was made without notice. None was required by the statute and none was

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[3] "It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. * * * It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute. * * * This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace. In *Roller* v. *Holly*, 176 U. S. 398, 409, 44 L. ed. 520, 524, Sup. Ct. Rep. 410, the court declared. 'The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' "

Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 425.

[4] This time a qualified judge, Honorable Henry M. Willis.

[4a] *Roller* v. *Holly*, 176 U. S. 398, 409.

given. The order shows that the Commissioner, through his counsel, presented and obtained the order *ex parte* transferring the title of the assets of the company to the Commissioner, not in trust as required by § 1057 of the Insurance Code, but in "fee simple". The state court holds that § 1037 (d) gives the commissioner, as conservator, broad powers[5] to deal with the assets in any way, subject, however, in certain instances, to the approval of the court, which it says he obtained. However, the opening provision of the section shows its unconstitutionality. It says that the "commissioner as conservator or liquidator * * * shall have authority *without notice*" to do the things therein specified with court approval. The statute itself declares its unconstitutionality because it expressly gives the commissioner the right to obtain court orders without notice.

The California court holds that this is a special proceedings. The consent of the company filed on July 22 is unimportant. If the statute does not accord due process, the lack of jurisdiction following cannot be conferred by consent.[6] A special statute must be strictly followed. Any proceedings outside of it are absolutely void.[7a]

We respectfully urge that these questions of due process were expressly raised both in the reasons in the petition and in the assignments of errors in the brief. (See Opinion this Court, page 4.)

If the order of August 11 reappointing the Commissioner conservator and vesting title in him was void for lack of due process, and it seems certain that it was, then all subsequent proceedings are absolutely void, including the final order of December 4. A valid order appointing Carpenter

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[5] R. 1534.

[6] *Lindsay-Strathmore Irrigation Dist.* v. *Sup. Ct.*, 182 Cal. 315; *Mitchell* v. *Maurer*, 293 U. S. 237; *Marin M. W. Dist.* v. *North Coast Water Co.*, 178 Cal. 324, 328.

[7a] *East Tenn. V. & G. Ry.* v. *So. Tel. Co.*, 112 U. S. 306, 310; *Smith* v. *Westerfield*, 88 Cal. 374, 378; *Murray* v. *Am. Surety Co.* (C. C. A. 9), 70 Fed. 341, 346.

conservator was a condition precedent to his proceeding under § 1043 to rehabilitate the company. That section, however, was unconstitutional because nowhere does the Code provide for notice preceding the approval by the court of rehabilitation agreements entered into by the Commissioner. The only notice given was by order of the court. "The order prescribed in detail the nature of the notice of the hearing required to be given. Pursuant thereto, notice in a form prescribed by the court" was posted, published in the newspapers and mailed to the policy holders and stockholders of the old company.[7] We have seen that this Court has held that, where a statute prescribes no notice, the law is unconstitutional and the court is without jurisdiction to order given, the notice omitted by the statute. This makes the final order of December 4th void for lack of due process.

The order of August 11, appointing the Commissioner conservator was collusive within the meaning of the decisions of this Court.[8] Section 1028 of the Insurance Code prevents the introduction of a collusive order in evidence. The order of August 11 was the only evidence of Carpenter's right to proceed after that time.

III.

The alternative remedy given non-assenters must be definite and absolute. It cannot be left to discretion.

A valid judgment appointing Carpenter conservator was necessary before the court could proceed to render the judgment of December 4, approving the rehabilitation agreement. The Commissioner could not proceed under § 1043 unless he was conservator. The cases cited show that due process was denied and the contracts of the policyholders impaired as contended in the petition and briefs on the writ of certiorari. The non-assenting policyholders

[7] R. 1524—Opinion of Cal. Supreme Ct.

[8] *First Nat. Bank* v. *Flershem*, 290 U. S. 504; *Shapiro* v. *Wilgus*, 287 U. S. 348; *National Surety Co.* v. *Coriell*, 289 U. S. 426.

were denied due process of law and their contracts impaired,[9] as no substantial right to redress by some effective method of procedure was provided by the mere contemplation in the plan (Opinion, this Court, p. 5) that, in due course, the commissioner would be appointed liquidator of the old company, and the recital of the Superior Court in its final order that, in the absence of evidence being brought up, the dissenting policyholders would receive more from the plan than they would receive in liquidation.

These are erroneous constructions of the constitutional rights of the non-assenting policyholders. No one, under the Code, except the Commissioner has the right to apply to the court to be appointed liquidator. He does not have to apply, but he may apply, if it appears to him that further efforts on his part as conservator would be futile.[1]

When the commissioner sees the futility of his acts as conservator, he then, in his discretion, may file his application with the court, and the court, after a "full hearing", has to exercise its discretion to determine whether or not the commissioner shall then be appointed liquidator. No effective procedure is thus provided within the meaning of *Gibbes* v. *Zimmerman*, 290 U. S. 326.

Although the petitioners have no constitutional right to any particular form of remedy, as this Court holds, they have an inviolate right to redress by some effective procedure. The Constitution guarantees to the non-assenting policyholder the right to file and enforce his claim by a procedure which is not dependent upon the discretion of any one, much less upon a commissioner's discretion, first determining that he has been a failure as a conservator and then dependent upon the discretion of the court after hearing.[2]

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[9] *Lovell* v. *St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 273; *Nor. Pacific Ry.* v. *Minn.*, 208 U. S. 583, 591.

[1] Cal I. C. § 1016.

[2] *Louisville and N. R. Co.* v. *Central Stockyards Co.*, 212 U. S. 132, 144; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115.

The non-cancellable income policyholders have to depend upon yet another contingency of discretion, this time that of the board of directors of the new company. The rehabilitation contract provides that they are to receive only a percentage of their claims in liquidation until at such times as certain profits are earned by the new company and, in the discretion of the board of directors, they are to be paid to the liquidator when and if he ever exercises his discretion to move the court for an appointment and the court, in its discretion, appoints him. No claim may be filed except with the liquidator.[3]

Nothing can be left to discretion. While the record may be incomplete because the evidence was not brought up, it, however, plainly appears from the judgment roll, the Insurance Code and particularly the plan that a policyholder who does not want to assent to the plan must assent or await the discretion of the commissioner to apply to be appointed and for the court to appoint him. The non-cancellable policyholders must await the further discretion of the board of directors to pay their claims in full from profits, which may or may not ever be earned.[4]

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[3] Cal. I. C. §§ 1021-1027.

[4] R. 1520—from opinion of California Supreme Court: any life policyholder not assenting to the plan was to file a claim with the commissioner as liquidator of the old company, all allowed claims to be paid by the new company as limited in the agreement. As to non-can policyholders, the new company was to agree to assume and to reinsure their policies at existing premium rates, but disability payments on such policies were to be assumed on a basis of from 20 per cent to 90 per cent of the face of such policies depending upon the year of issue. Certain provisions were incorporated in the proposed agreement for future increased benefits to be paid to consenting non-can policyholders from certain profits of the new company. Nonconsenting non-can policyholders were to file claims with the commissioner as liquidator of the old company, all [fol. 1516] allowed claims to be assumed by the new company as proided in the agreement.

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"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."[5]

"The law itself must save the party's rights and not leave them to the discretion of the courts as such."[6]

For the sake of the Constitution and the protection of the 125,000,000 contracts of 65,000,000 policyholders, a rehearing should be granted so that the application of the Federal Constitution to a case of this kind may not be dependent upon the discretions *ad seriatim* of a state insurance commissioner, a state court, and a board of directors of a reorganized insurance company. We respectfully claim that the decision, in effect, relinquishes to the discretion of those three tribunals the right to determine the application to insurance contracts of Article I, Section 10, and the due process clause of the 14th amendment of the Federal Constitution.

This court (Opinion pages 5 and 6) indicates that, if the evidence was before it, possibly the decision herein might have been different. The recitals in the final order of the Superior Court, reproduced on Page 5 of the Opinion, do not touch upon the questions of due process and the impairment of the obligation of contract. They refer to the practicability or feasibility of the plan, amounting to a mere assertion that the plan does not violate the Constitution. The plan itself shows that it does, so this is an assertion contradictory of the judgment roll and of the Insurance Code. Constitutional guaranties cannot be set aside by assertion.[7] In such circumstances where the proceed-

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[5] *Roller* v. *Holly*, 176 U. S. 398; *Louisville and Nashville Ry. Co.* v. *Central Stockyards*, 212 U. S. 132, 144; *Riverside Cotton Mills* v. *Menefee*, 237 U. S. 189, 193.

[6] *Louisville & N. Ry.* v. *Central Stockyards Co.*, 212 U. S. 132, 144.

[7] *Morgan* v. *U. S.*, 304 U. S. 1.

ings are begun without due process, evidence adds nothing to them.[8]

The application filed August 14 for the appointment of the Commissioner as liquidator was never acted upon because it was abandoned.[9] It cannot be acted on now because it has been merged in the final judgment.

The court might readily consider as a part of the justice of the petitioners' cause the practical difficulties which beset them in their efforts to protect the policyholders against what we believe the record shows to be a collusive proceeding. As a part of this collusion and in order to beat down opposition to the plan, arranged between a small group of corporate officers and the Insurance Commissioner, it usually is and seems to have been the strategy here to build up a record so large that the expense of bringing up the evidence on appeal is a practical impossibility. The Commissioner and that small group of officers of the old and new companies have at their disposal the whole of the $223,000,000 of the policyholders' reserves with which to fight the dissenters in the court. A glance at the judgment roll indicates that to have the evidence reported and printed, with all the data and statistics that ordinarily is introduced at such a hearing, would cost those who appealed, by conservative estimate, not less than $50,000.

The policyholders are unorganized and cannot be welded into a group. No one but the Commissioner and the officers in control know who they are because the Commissioner and the company guard with the greatest secrecy the list of

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[8] "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 424.

[9] Referred to top of page 5 in Opinion of this Court. See Opinion of *Cal. Supreme Ct.*, R. 1522. At R. 1526 Cal. Supreme Ct. held that all of judgment roll was one record merged into final judgment of Dec. 4.

policyholders. An application to be given a list was denied by the Superior Court in this case. In the helpless condition in which the policyholders who dissent from such a plan find themselves in appealing to the upper courts in this day of the consolidation of their reserves in a few hands, it may in time, if we have not already reached that day, become a denial of due process, to require a policyholder to bring in a record which is entirely beyond his means in order to obtain a full hearing before an appellate court.

For these reasons, we respectfully urge that this motion for rehearing be granted and that the judgment of the Supreme Court of California be reversed and that the issuance of the mandate of this Court be stayed, pending the disposition of this motion and of the rehearing.

Respectfully submitted,

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VERNON BETTIN,
By WM. H. NEBLETT,
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ALFRED F. MACDONALD,
ALLAN MCCURDY,
Of Counsel.

Washington, D. C.
December 23, 1938.

CERTIFICATE.

I, Wm. H. Neblett, one of the counsel for the petitioners herein, do hereby certify that in my opinion the foregoing petition for rehearing and for stay of mandate pending its determination and decision is sound in law and that the same is presented in good faith and not for the purposes of delay.

WM. H. NEBLETT.

APPENDIX.

CALIFORNIA INSURANCE CODE

1028. A judgment taken by default, or by collusion, against an insured shall not be considered as evidence, in the liquidation proceeding, either of the liability of such insured to such claimant upon such cause of action or of the amount of damages to which such claimant is entitled.

1037. Upon taking possession of the property and business of any person in any proceeding under this article, the commissioner, exclusively and except as otherwise expressly provided by this article, either as conservator or liquidator:

1037 (e). The commissioner as conservator or as liquidator * * * shall have authority to transfer to a trustee or trustees, under a voting trust agreement, the stock of an insurer heretofore or hereafter issued to him as conservator or as liquidator in connection with a rehabilitation or reinsurance agreement, or any other proceeding under this article. Such voting trust agreement shall confer upon the trustee or trustees the right to vote or otherwise represent such stock, and shall not be irrevocable for a period of more than twenty-one (21) years.

1038. Any application upon section 1011 or 1016 shall be served upon the person named in such application in the manner prescribed by law for personal service of summons or as provided by section 1039.

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1938.

Wm. H. Neblett, Vernon Bettin, William George Dickinson and Alfred E. MacDonald, Petitioners, *vs.* Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, et al.	On Writ of Certiorari to the Supreme Court of the State of California.

[December 5, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The questions raised are whether proceedings for the rehabilitation of an insurance company, pursuant to the Insurance Code of California,[1] unconstitutionally deprive policy holders of their property without due process of law, or impair the obligation of their contracts.[2]

For many years the Pacific Mutual Life Insurance Company of California has written life, health, and accident insurance. Since 1918 it has issued noncancelable health and accident policies. The Insurance Commissioner of California determined that, while the life and general health and accident business was in sound condition, there was an over-all deficit in reserves due to the unprofitable nature of outstanding noncancelable health and accident risks, with the result that the company was insolvent within the meaning of the Code. July 22, 1936, the Superior Court of Los Angeles County, on his application, appointed him conservator. On the same day he applied for and obtained an order which appointed him liquidator of the company. On the same day, as conservator, he peti-

[1] Statutes 1935, Chap. 145, pp. 540-553. The sections of the Insurance Code bearing upon the issues in the case are 1011-16, inclusive, 1021, 1024, 1025, 1035, 1037, 1043.

[2] In the court below contentions were made under the equal protection clause of the Fourteenth Amendment but neither the reasons stated in support of the petition nor the assignments of error in this court present any question under that clause.

tioned for authority to rehabilitate the company and submitted a plan embodying an agreement, to be executed by the company and himself as Commissioner, with a new corporation, which he would form, all of whose capital stock he would purchase with the assets of the company, and to which he would transfer most of the assets, retaining the stock of the new company and certain other assets of the old. The new company was to assume the policies and obligations of the old company to the extent provided in the agreement. Policy holders were to have the option of taking insurance from the new company or proving their claims for breach of their contracts, provision for payment being made by covenants of the new company and the retained assets of the old. The court approved the plan and authorized the execution and performance of the agreement.

Shortly afterwards it was discovered that the judge who acted in the cause was probably disqualified by ownership of a policy issued by the company. August 11, 1936, another judge entered an order, which, after adverting to the possible disqualification of the judge who made the earlier orders, ratified, approved, and confirmed the order appointing the Commissioner conservator and, on the basis of the petition filed on July 22, independently, and as an original order, appointed the Commissioner conservator, invested him with title to all the company's assets, and authorized him to endeavor to consummate a rehabilitation or reinsurance plan. On September 25 the Commissioner presented a further petition for approval of the rehabilitation and reinsurance agreement, which recited his actions taken pursuant to the court's orders and to the plan of rehabilitation, and asked approval thereof. An order issued which directed all interested persons to show cause why the agreement, and what had been done pursuant to it, should not be approved and all the prior acts of the Commissioner ratified and confirmed, and fixed a hearing. At the hearing, which lasted from November 19 to December 4, many officers, stockholders and policy holders who had intervened, including the petitioners, were heard. Plans of rehabilitation presented by some of them were considered; evidence was taken and argument was had. December 4 an order was entered approving the Commissioner's plan and agreement, ratifying the action he had taken, and authorizing him as conservator, and as liquidator, if he should be appointed as such, to carry out the rehabilitation agreement. The

court retained jurisdiction to make further orders for the effectuation of the plan and agreement.

The Supreme Court of California affirmed the order.[3] The action of that court in overruling certain of petitioners' contentions is claimed to have deprived them of their property without due process.

The Court declared that the orders of July 22, 1936, were void because of the disqualification of the judge who made them. The petitioners argue that in consequence the Commissioner's transfer of assets to a new company pursuant to the approved plan was void and that its illegality could not be cured by subsequent court action. The Supreme Court held, however, that the court in which the Commissioner's original petition was filed thereby acquired jurisdiction and that the avoidance of the orders made by the disqualification of the judge who entered them did not disenable a qualified judge thereafter from entering valid orders based on the petition. It is further urged that as the old company's assets were transferred to the new pursuant to a void order there was nothing on which any later order could operate. The later order, which is the subject of review, ratified and confirmed the transfer, and the Supreme Court held the order effective under the Insurance Code.

It is said that the Code does not authorize the Commissioner to delegate to a corporation organized by him powers and duties in aid of his administration of the assets of an insolvent insurance company. The state court has held such procedure is in accordance with the Code provisions.

It is argued that the authority which the Code confers on the Commissioner to enter into rehabilitation or reinsurance agreements does not embrace a contract for assumption of the insolvent company's policies by a new company organized by the Commissioner. The court below held the provisions of the statute contemplated such action.

It is claimed that the Commissioner's action violated certain state statutes concerning fraudulent conveyances. The state court held the contrary.

All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amend-

[3] Carpenter v. Pacific Mutual L. I. Co., 10 Cal. (2d) 307.

ment.[4] We are, therefore, without jurisdiction to review the state court's decision of any of those questions.

It is argued that the Code unconstitutionally delegates legislative functions to the Commissioner, and that the Supreme Court erred in not so holding. This, again, is a question of state law the decision of which by the State's highest court is binding upon us.[5]

The Insurance Code provides: "In any proceeding under this article, the commissioner, as conservator . . . may, subject to the approval of said court, . . . mutualize, or reinsure the business of" an insurance company "or enter into rehabilitation agreements." The petitioners assert that this language is so vague that no one can determine what powers are intended to be conferred upon the Commissioner and that the state courts, in construing the Code to authorize the plan and procedure here in question unconstitutionally attempted to read a meaning into the statute of which it is not susceptible, and thus deprived the petitioners of their property without due process. The court below fully considered the contention and overruled it. We think its decision was justified by the criteria approved by this court.[6]

The petitioners unsuccessfully claimed in the Supreme Court that the method of liquidation adopted by the Commissioner and approved by the court, even if authorized by the Insurance Code, denies them due process and impairs the obligation of their policy contracts. Because of these contentions we granted certiorari.

One of the petitioners holds a life policy which, if he assents to the plan, will be replaced by a policy of the new company for the same amount. The others are holders of noncancelable health and accident policies no liability under which has accrued. If they assent to the plan and accept the obligation of the new company, in lieu of that of the old, they will receive insurance for only a percentage of the face value of their old policies. The alternative open to all is to dissent from the plan and to prove their claims for breach of their policy contracts against the liquidator of the old company. They insist this option is not available to them as no

[4] Arrowsmith *v.* Harmoning, 118 U. S. 194, 196; Central Land Co. *v.* Laidley, 159 U. S. 103, 112; Iowa Central Ry. Co. *v.* Iowa, 160 U. S. 389, 393; West *v.* Louisiana, 194 U. S. 258, 261; Standard Oil Co. *v.* Missouri, 224 U. S. 270, 287; McDonald *v.* Oregon R. & N. Co., 233 U. S. 665, 669; American Ry. Exp. Co. *v.* Kentucky, 273 U. S. 269, 273.

[5] Ohio *v.* Akron Park District, 281 U. S. 74, 79.

[6] Connally *v.* General Construction Co., 269 U. S. 385, 391.

liquidator has been appointed. When they took their appeal to the State Supreme Court, there was pending an application for the appointment of the Commissioner as liquidator, and no reason is assigned why action cannot be taken upon this petition pursuant to the plan. The Supreme Court has said: "The proposal contemplates that in due course the commissioner will be appointed liquidator of the old company, and in that capacity will receive, liquidate, and pay all claims against the old company from the old company's assets not transferred to the new company (including the new company's stock), and from certain moneys furnished to the liquidator by the new company as provided in the agreement." The petitioners assert that the funds provided will be insufficient for the payment of their claims and others of like character, should they dissent from the plan. The order of the Superior Court recites that the plan makes adequate provision for each class of policy holders, for the creditors, and for the stockholders; that the plan is fair and equitable; that it does not discriminate unfairly or illegally in favor of any class of policy holders; that the intangible assets conserved by the plan are worth several million dollars and that if the old company were dissolved and its assets sold their value would be substantially less than the amount which will be realized from them under the plan.

The record upon which the appeal was taken to the Supreme Court of the State, and which has been brought here by our writ, contains only the judgment roll. The evidence is not before us and the court below has held that, under the state law, the judge was not bound to make special findings. We must presume that there was substantial evidence to sustain the court's decree. On account of the state of the record the petitioners are unable to point to any evidence to sustain their contention that if they dissent they will not receive as much in liquidation of their claims for breach of their policy contracts as they would upon a sale of assets and distribution of the proceeds.

The petitioners have no constitutional right to a particular form of remedy.[7] They are not entitled, as against their fellows who prefer to come under the plan and accept its benefits, to force, at their own wish or whim, a liquidation which under the findings will not advantage them and may seriously injure those who accept the benefit of the plan. They are not bound, as were the dis-

[7] Gibbes v. Zimmerman, 290 U. S. 326, 332; Doty v. Love, 295 U. S. 64, 70.

senting creditors in *Doty* v. *Love*, 295 U. S. 64, to accept the ob gation of the new company but are afforded an alternative wherel they will receive damages for breach of their contracts. They ha failed to show that the plan takes their property without d process.

It is not contended that a statutory scheme for the liquidation an insolvent domestic corporation is *per se* an impairment of t obligation of the company's contracts. The argument is that t impairment of contract arises from the less favorable terms a conditions of the new noncancelable policies which are to be su stituted for the old ones and, in the case of the life policies, by t substitution of a new company as contractor in place of the ol without the consent of the policy holder. This position is bo tomed upon the theory that the policy holders are compelled accept the new company as insurer on the terms set out in the r habilitation agreement. As has been pointed out, they are not compelled but are given the option of a liquidation which on th record appears as favorable to them as that which would resu from the sale of the assets and pro rata distribution in solution all resulting claims for breach of outstanding policies.

Judgment affirmed.

Mr. Justice REED took no part in the consideration or decision this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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